

BEFORE THE

COPYRIGHT ARBITRATION ROYALTY PANEL

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DISTRIBUTION OF 1990,
1991 AND 1992CABLE ROYALTY FUNDS
=====Docket No.
94-3-CARP-CD90-92Hearing Room 414, Fourth Floor
Madison Building
Library of Congress
101 Independence Avenue, S.E.
Washington D.C.

Wednesday, December 13, 1995.

The above-entitled matter came on for hearing,
pursuant to notice, at 9:30 a.m.BEFORE:

THE HONORABLE MEL R. JIGANTI, Chairperson

THE HONORABLE JOHN B. FARMAKIDES

THE HONORABLE RONALD WERTHEIM

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
APR 1991				
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Larry Gerbrandt				
By Mr. Lane		1586		
Ken Burns				
By Ms. Behan	1659		1710	
By Mr. Hester		1676		
By Mr. Lane		1696		
By Ms. Austin				1712
Larry Gerbrandt				
By Mr. Lane		1717		
By Mr. Hester		1741		
By Ms. Hand		1773		
By Mr. Garrett			1774	

E X H I B I T S

<u>Exhibit No.</u>	<u>Description</u>	<u>Marked</u>	<u>Received</u>
<u>Program Suppliers</u>			
27-X	A&E Expense/Viewer Ratio	1602	
28-X	Cable TV Programming	1642	
29-X	Article by Jonathan Yardley	1698	
30-X	Article by Tony Kornheiser	1707	
31-X	Cable TV Programming 05-31-91	1728	
<u>Public Broadcasting</u>			
3-X	Newsweek Cover	1682	
<u>Joint Sports Claimants</u>			
8	Distribution Chart: Cable Channel and Superstation	1790	
9	Distribution Chart: Broadcast Networks	1790	
10	Viewing Numbers v Marketplace Transactions	1790	

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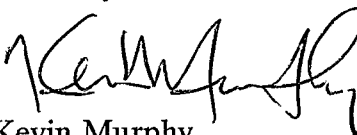
Tanya Sandros
Copyright Arbitration Royalty Panel
Room 407 (OGC)
101 Independence Avenue, SE
Washington, DC 20024

Re: Transcript of December 13, 1995
Distribution of 1990-92 Cable Royalty Funds

Dear Ms. Sandros:

It has come to our attention that the index page for the above-referenced proceeding is not exactly correct. Enclosed please find a corrected index page (original & three copies) to replace that currently in the transcript. Apologies for any inconvenience.

Sincerely,



Kevin Murphy

cc: all parties in receipt of transcript

I N D E X

WITNESS DIRECT CROSS REDIRECT RECROSS

Ken Burns

By Ms. Behan	1659		1710	
By Mr. Hester		1676		
By Mr. Lane		1696		
By Ms. Austin				1712

Larry Gerbrandt

	Start	1586	
By Mr. Lane		1717	
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Joint Sports Claimants

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P-R-O-C-E-E-D-I-N-G-S

(9:42 a.m.)

CHAIRPERSON JIGANTI: Mr. Lane, you may proceed.

MR. LANE: Thank you.

Q Could you turn to page 20 or your testimony, Mr. Gerbrandt?

As I understand it, this page is based on page 51 at the back of the book, is that correct?

A That is correct.

Q Did you -- how did you gather --

First of all, let me understand something, because I am a little bit confused here.

If we take page 51 and 54, okay? Do you have those two pages?

A Yes.

Q Now, one is titled Programming and Production Expense and the other is titled Programming Expenses. Do you see that?

A Yes.

Q Now, let's just look at, for example, USA, on both pages, the numbers 135 for 1990, 195 for 1991 and 225 for 1992 are the same on both pages, is that correct?

A That is correct.

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1 Q So, is there any difference in how you
2 calculated USA on these two pages? The expenses for
3 USA on these two pages?

4 A No.

5 Q Is there any difference in the way you
6 calculated other than breaking out certain sports
7 programming on page 54, the way you calculated the
8 expenses on the two pages?

9 A No, there is not.

10 Q Now, let's go back to page 51 for a
11 minute. How did you gather these data?

12 A This is data that Paul Kagan and
13 Associates has collected over a period of a number of
14 years. They are done, as I think I described earlier.

15 We look at company financial reports,
16 press releases, trade reports. We make our own
17 estimates and hold discussions with network
18 executives.

19 There are a variety of internal checks and
20 ratio checks that can be done to get numbers into --
21 that seem to be outliers, and we spend extra time
22 researching those.

23 It is an ongoing, year round continuous
24 process of collecting information from the market
25 place.

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1 Q Are the data all reported by the companies
2 on the same basis?

3 A We attempt to get the information on the
4 same basis. Certainly, the public companies tend to
5 report, as close as we can determine, about the same.

6 We try to use the same methodology that we
7 described earlier of how accounting takes place for
8 each company. A concerted attempt is made to have
9 this be an apples to apples comparison.

10 Q The accounting practice to which you
11 specifically referred on page 19 was amortizing the
12 cost of programming over the useful life of the
13 programming.

14 A That is correct.

15 Q Now, do any of these companies use
16 accelerated amortization and some of them use straight
17 line and how did you take those differences into
18 account?

19 A I can't tell you company by company what
20 their accounting practices are. I can make a couple
21 of observations.

22 One is that, over a period of time,
23 whether it is accelerated or straight line tends to
24 even itself out when you take multiple years.

25 B, when you have networks that are growing

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1 as these are -- if a company were to use an
2 accelerated it tends to show-up. They have to put on
3 a 24 hour slate of programming each year so you would
4 get very wild variations if they were to do that.

5 So, it becomes apparent if that is the
6 case. And we don't see that.

7 Our understanding is that the networks by
8 and large use a useful life approach. It may be
9 weighted to the first year when they take, in the
10 early life of the program. But very often their
11 licensing, especially TV series and movies, for
12 multiple runs over multiple years.

13 So you do get a leveling out effect
14 because each year they are buying additional
15 programming and it then is amortized out over a period
16 of years.

17 Q So you are saying that even if they
18 accelerate amortization that might be on program one,
19 they are in the year run where it might be high, and
20 on program two they are in year five of that and it is
21 relatively low and all that balances out, is that
22 correct?

23 A That is correct. And also, again, the
24 next year they have to buy additional programming
25 because they are always working ahead on buying it.

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1 None of this happens in an isolated market place; it
2 happens within an ongoing, vibrant, growing market.

3 Q Did you take into account when each of
4 these networks began operation?

5 A Not directly. The cost structures tend to
6 be reflective of where they are in terms of their
7 subscriber counts or when they launched. But it is
8 not something that we specifically looked at because
9 it is implicit in the numbers.

10 Q What do mean that their cost structure
11 would be affected by when they started?

12 Would they have lower costs, higher costs?
13 I just don't understand what you meant by their cost
14 structure.

15 A It's not a perfect symmetry, but some of
16 the newer networks, a case might be CNBC, would have
17 a programming cost structure that is lower than a
18 network that is older.

19 But again, that is not necessarily the
20 case because if we look at the list here, BET preceded
21 CNBC by quite a few years and it has a lower cost
22 structure.

23 But in a general sense, newer networks
24 tend to have lower cost structures than older
25 networks.

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1 Q And how would newer networks versus older
2 networks affect the viewing numbers that you
3 presented?

4 A Youthfulness does not necessarily, in and
5 of itself, have anything to do with viewing levels.
6 TNT is actually one of the youngest networks on the
7 list and has relatively high viewing levels. It is
8 far more dependent on the type of programming that is
9 carried.

10 If we had a network that was a start-up
11 network in this list, which we really don't, they
12 would probably have a smaller subscriber base and
13 possibly lower viewer numbers as a result of that.

14 Q How would that carry through to the ratios
15 that you are presenting of program expenses to viewing
16 shares?

17 For example, if you were a new network
18 wouldn't you have to buy a lot of programming and have
19 relatively high expenses? It's going to take some
20 time to build up your audience.

21 A That's not -- while that could be true,
22 that's not actually the way the industry works.

23 The companies that launch cable networks
24 try not to lose enormous sums of money in the first
25 few years. They are also carried in relatively few

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1 homes.

2 You can't compete when you are small for
3 the expensive programming, it simply doesn't make
4 economic sense. Networks which have done what you
5 have suggested, which is go out in their very early
6 years and spent a great deal on programming, are no
7 longer around.

8 I can cite you the case studies of those
9 who have taken that approach. CBS cable, the Monitor
10 channel, just to name a couple.

11 So, the industry approach has been to
12 limit programming expenditures in start-up years in
13 order to stay around for the long haul. And that
14 indeed is the case if you go back and track the
15 history of successful networks, that is indeed what
16 they have done.

17 Q So, it would be fair to say that they are
18 trying to match their expenses to what they expect the
19 audience to be?

20 A I think they try to match their expenses
21 to a whole range of cost structures -- No, not really
22 because there are networks that very efficiently
23 convert certain categories of programming into
24 viewing.

25 A weather channel, for instance, could

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1 triple the amount of money it spent to put itself on
2 the air and they probably would not triple the
3 viewing.

4 A weather map is a weather map.

5 So, in this case you have a fixed
6 programming expense network. Very efficient at
7 converting the programming into viewing. But it is
8 category by category, there is not a one-on-one
9 relationship between that.

10 So, I think that was a long answer to
11 'No'.

12 Q Could you turn to page 24 of your
13 testimony, please.

14 A Sure.

15 CHAIRPERSON JIGANTI: Mr. Lane, excuse me
16 one moment. Something that confuses me here on page
17 54, exhibit number 5. At the very top of the page you
18 have Sports Fees or should that be Sports Expenses?

19 THE WITNESS: Actually, the word is
20 correct in that those are the fees that are actually
21 paid to license those sports packages.

22 If you were to include the expenses, you
23 would also have to include the, as we noted, the
24 production costs of producing the games.

25 CHAIRPERSON JIGANTI: Which would be on

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1 page 51 which includes your production costs?

2 THE WITNESS: That is correct.

3 ARBITRATOR WERTHEIM: The sports fees are
4 the same as what we have been referring as rights
5 fees?

6 THE WITNESS: That is correct.

7 Q Do you have page 24 in front of you, Mr.
8 Gerbrandt?

9 A I do.

10 Q Now, you earlier mentioned CNBC as one of
11 the young networks in your group, is that correct?

12 A That is correct.

13 Q And looking down the list, and I will just
14 stick with 1990 for the ease of reference, isn't it
15 true that CNBC has the highest ratio of programming
16 spending to viewing?

17 A That is correct in 1990, falling rapidly
18 as we go forward which is exactly what we would expect
19 in a start-up network.

20 Q And why is that exactly what you would
21 expect from a start-up network?

22 A In the early years, you have to put on at
23 least a base amount of programming, no matter what
24 your viewing audience is. It takes a certain amount
25 of programming to fill 24 hours and it is a national

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1 network.

2 So, it takes time for -- time measure in
3 a few years, for it to build up its audience base.
4 So, very early on, one would expect to see a ratio
5 like this.

6 Q And could you just look at CNN and HN. Is
7 that Cable News and Headline News?

8 A That is correct.

9 Q You see that the ratio falls pretty
10 significantly -- well, I shouldn't say significantly,
11 it falls in 1991 from the other two years, is that
12 correct?

13 A That is correct.

14 Q I take it, under your chart, the way we
15 should read that is that there was more viewing in
16 1991 to CNN and HN than in the other two years,
17 assuming all other things are equal.

18 A As I recall, there was a little skirmish
19 with Saddam Hussein that year. I don't mean to
20 minimize that. It was the result of the Gulf War.

21 Q And CNN got a lot of viewing that year
22 from the Gulf War.

23 A That is correct.

24 Q And that would tend to lower the ratio by
25 itself, the way that you have calculated it.

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1 A The way we have calculated a one-time,
2 extraordinary event like that would certainly -- since
3 it lasted as long as it did and had the intense
4 coverage and exclusive coverage, it did have a
5 significant impact in that one year.

6 Q Now, yesterday, Judge Farmakides asked you
7 about A & E in 1990 in the 1.0 which in this table
8 would be the perfect relationship, is that correct?
9 Meaning that they have matched program spending to
10 viewing.

11 A What it means is that, on a relative
12 basis, what they spent on programming translated into
13 the industry average of what you would expect for
14 viewing.

15 Q Now, did you make any attempt to average
16 this table? To find out what the average ratio was
17 for all these 16 cable networks in each year?

18 A I don't recall if I did or not. The goal
19 was to generate a series of bar chart comparisons ,as
20 I don't think so.

21 CHAIRPERSON JIGANTI: Mr. Gerbrandt, a
22 question asked of you by Mr. Lane, if I recall it,
23 something about the ration being 1 to 1 would be a
24 perfect ratio.

25 THE WITNESS: Yes.

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1 CHAIRPERSON JIGANTI: And you gave a
2 response to that. I don't recall, exactly, your
3 response.

4 THE WITNESS: There is, to call it a
5 perfect ratio, I didn't buy into that statement.

6 What it means is that, on a relative
7 basis, what they spent on programming translated into
8 the industry average of viewing. So, for every dollar
9 of programming value, they got a unit of viewing value
10 back out. So, you have a one-to-one relationship
11 between program value and viewing levels.

12 ARBITRATOR WERTHEIM: Why did you use the
13 industry average for viewing when you are not using
14 the industry average for the networks' programming?

15 THE WITNESS: Because the way that this is
16 calculated is to divide it into the industry total.
17 We are talking about this network's share of total
18 industry program spending or this 16 network group,
19 versus its share of this 16 network group viewing.

20 So, we are comparing how much money of all
21 the money that was spent on programming on those 16
22 networks. What was the per centage that they spent
23 and how did that translate into its per centage of
24 viewing that all 16 networks got?

25 So, you are really comparing it to the

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1 industry.

2 That is why I used that phrase.

3 Q Well, let's just go back for a minute and
4 go through that. Can you turn to page 15 of your
5 testimony, please. And let's just stick with A & E
6 for the ease of going through this, if you don't mind,
7 and we will just stick with 1990, if you don't mind.

8 Is that agreeable with you, Mr. Gerbrandt?

9 A It's your cross, I believe.

10 Q Thank you. All right, if we look on page
11 15, at table A-1, that refers, does it not, back to
12 page 52 in the back of your testimony?

13 A That is correct.

14 Q If we look at page 52, that's the average
15 day household viewing hour of A & E for 1990 was
16 3,000, and the total for the 16 networks was 99,292.
17 Do you see that

18 A Yes. It's actually 3 million.

19 Q I'm sorry. They are both in millions.

20 If I divide the 3 million by 99,292 would
21 I get 3 per cent as you have shown on page 15; is that
22 the calculation that you did?

23 A Yes.

24 Q And if I went down and asked you about
25 every other cable network and say, BET, it is 1,568

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1 over 99,292 will give us 1.6, as you show on page 15,
2 is that correct?

3 A That is correct.

4 ARBITRATOR WERTHEIM: Where did you get
5 your denominator in that. If you divide the 3 million
6 by --

7 MR. LANE: If you look at the bottom on
8 page 52, Judge Wertheim, you will see 99,292 is the
9 total of the viewing of the 16. And that is correct,
10 is it not, Mr. Gerbrandt?

11 THE WITNESS: That is correct.

12 Q And if we went through this and I asked
13 each number and you just basically divide each one of
14 those by the total line at the bottom for the
15 particular year, is that correct?

16 A That is how I described it originally.

17 Q Right. And then you show all those
18 results on page 15, right?

19 A That is correct.

20 Q Now, we are going to turn to page 20 and
21 page 51 at the same time. And those two tables are
22 comparable, are they not? In other words, page 20 was
23 derived from the numbers on page 51, is that correct?

24 A That is correct.

25 Q Again, if we stick with A & E for 1990, we

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1 see 38.4 million as it's program expense for 1990, and
2 the total for the 16 networks is 1, 239,400,000, is
3 that correct?

4 A That is correct.

5 Q And if I divided those two numbers I would
6 get 3.1, is that correct?

7 A That is correct.

8 Q And you show that on page 20, is that
9 correct?

10 A That is correct.

11 Q Okay. Now, we go to page 24, with A & E.
12 Isn't what you have done on page 24 is simply divide
13 the per centage that you had - let's see, I'm not
14 sure, spending to viewing -- So you divided the ratio
15 for A & E of 3.1 expenses on page 20 by the share of
16 household viewing hours, 3.0 on page 15 and that gave
17 you the 1.0, is that correct?.

18 A That is correct.

19 Q And then, you've also shown, have you not,
20 on the bar charts on page 22, I'm sorry on page 21 for
21 1990?

22 A That is correct.

23 Q And the first bar chart is the A & E and
24 that is where we see 3.1 for the expense and 3.0 for
25 the viewing.

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1 A That is correct.

2 Q And that division equals the 1.0 that we
3 are seeing on page 24.

4 A That is correct.

5 Q And we could do the same thing about every
6 other number on these tables, and it would be
7 calculated the same way we did for A & E for 1990, is
8 that correct?

9 A Well, for tables --

10 Q For table B-5 on page 24.

11 A Within this group, yes. That is the way
12 they calculated these.

13 Q We will get into the other ones. But we
14 are just sticking with this table for now.

15 So, this is really the division of the
16 table B-1 on page 20 by the numbers on table A-1 on
17 page 15, is that correct?

18 MR. GARRETT: Sorry, what is --

19 MR. LANE: Table B-5, the number for A &
20 E and each of the cable networks in each of the years.

21 A That is correct.

22 Q Now, you said that you hadn't done an
23 average. I would like to introduce as exhibit 27-x a
24 one-page document and ask Mr. Gerbrandt if I have
25 copied the numbers correctly from page 24 as to the

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1 ratios?

2 (Whereupon, the above referred-
3 to document was marked as
4 Program Suppliers' Exhibit 27-x
5 for identification.)

6 A It appears that the numbers are correct.

7 Q As indicated at the bottom line, I simply
8 averaged those numbers and the results are shown
9 there. If you can check if those are the average of
10 those numbers.

11 A Would you like me to actually do the
12 calculations?

13 Q If you want. I would be happy if you want
14 to, sure.

15 MR. GARRETT: I think we'll stipulate
16 that.

17 MR. LANE: Is that agreeable to you, Mr.
18 Gerbrandt? You are the witness, you don't have to
19 follow.

20 MR. GARRETT: Well, I understand the
21 concept here and the only qualification to the
22 stipulation is that I believe that the numbers here
23 are rounded numbers.

24 ARBITRATOR FARMAKIDES: You mean the
25 numbers in that table are rounded?

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1 MR. GARRETT: The numbers in table B-5 are
2 rounded.

3 ARBITRATOR FARMAKIDES: So you are
4 suggesting then that the averages might -- well, I'm
5 not quite sure.

6 CHAIRPERSON JIGANTI: Will you accept the
7 stipulation, Mr. Lane?

8 MR. LANE: Sure.

9 Q Did you want to qualify it in the way that
10 your Counsel has suggested?

11 A I'll run with the numbers as you've
12 calculated them here and see where this goes.

13 Q Now, you say, do you not, in the first
14 line of page 25, that if the viewing share and share
15 programming expenses were the same, the ratio would be
16 1.0. Do you see that?

17 A Yes, I do.

18 Q We talked about that earlier. Is it your
19 opinion that if the ratio is above 1.0 that that's
20 better?

21 A I don't think I ever used the term
22 'better'. What it means is that the network was
23 spending a greater amount to generate an equivalent
24 level of viewing.

25 Q Okay. Is that a good thing or a bad

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1 thing?

2 A I think I could probably cite instances
3 where it is both good and bad. It is certainly
4 something that networks do, especially for certain
5 categories of programming.

6 And there are certain types of programming
7 that do generate these kinds of ratios.

8 Q You say, on page 25, that ESPN programming
9 has more than twice as much value as ESPN's share of
10 viewing would indicate. Do you see that?

11 A That is correct.

12 Q What is the import of that sentence?

13 A It means that they spent twice as much on
14 programming to generate the equivalent amount of
15 viewing.

16 Q Is the amount that you spend on
17 programming, do you equate that with value, as you use
18 it on page 25?

19 A It is one way of measuring value.

20 Q Is viewing another way of measuring value?

21 MR. GARRETT: Value to whom?

22 MR. LANE: Value as he used it on page 25.
23 And he said that expenses were one way, and I asked
24 him if viewing was another way.

25 THE WITNESS: Not in this context.

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1 Q What are some other ways?

2 ARBITRATOR WERTHEIM: I'm sorry. I didn't
3 hear the answer to the last question.

4 THE WITNESS: I said not in this context.

5 ARBITRATOR FARMAKIDES: Could you kindly
6 explain that, sir.

7 THE WITNESS: Sure. Viewing is not --
8 What we are trying to understand here is what -- how
9 program networks value programming and how cable
10 operators value programming or value the networks that
11 carry the programming.

12 The value issue is the programming. And
13 you asked me as the second follow-up question, is
14 there another way. And the answer to that is yes.
15 That's the affiliate fees, that's the other half of
16 the answer I just gave you.

17 The way we approached determining value
18 was within the context of what is spent on programming
19 relative to what it generates on viewing and from the
20 operator's side, what proportionate share of overall
21 industry license fees was spent to license these
22 networks.

23 Q I guess my question is, if viewing is not
24 a measure of value, why did you put all these ratio
25 tables in here? You could have just presented us with

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1 the amount that was spent.

2 What does the viewing add to this, in your
3 mind?

4 A What it shows is that certain categories
5 of programming -- that viewing alone is not an arbiter
6 of value. There is clearly another dynamic that is
7 going on in the market place and that is that the
8 networks spend disproportionately for certain
9 categories of programming. The cable operators are
10 clearly spending disproportionately for certain types
11 of networks. And this is a way of measuring that.

12 Viewing is a way of doing that comparison.
13 It is a constant amongst all the networks.

14 Q Now, looking at the chart on page 24, does
15 that mean what you have just said? That CNBC, in
16 1990, had more value than ESPN because CNBC had a 4.3
17 ratio and ESPN had only a 2.2?

18 A What it meant was that its programming was
19 four times as expensive or they spent four times on
20 programming versus the equivalent amount of viewing
21 they received.

22 ARBITRATOR FARMAKIDES: Who do you mean by
23 'they'?

24 THE WITNESS: That is CNBC.

25 Q Well, I want to relate this to your

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1 sentence on page 25 where you say that ESPN
2 programming had more than twice as much value. Does
3 this mean CNBC's programming in 1990 had four times as
4 much value and was twice as valuable as ESPN, as you
5 use it on page 25, as you use those terms on page 25?

6 MR. GARRETT: I'll object to the form of
7 the question. It is a compound question.

8 ARBITRATOR WERTHEIM: Maybe you could
9 rephrase it, Mr. Lane?

10 MR. LANE: Okay.

11 Q I want -- would you refer to page 25,
12 please? Do you have that, sir?

13 A Yes, I do.

14 Q Okay. The second sentence at the top of
15 the page refers to ESPN's programming had more than
16 twice as much value as ESPN's share of viewing would
17 indicate. Do you see that?

18 A Yes, I do.

19 Q And we have discussed what that sentence
20 meant, right?

21 A We have discussed what that sentence
22 meant.

23 Q Okay. Now, what I am asking you is, in
24 the context of that sentence, does CNBC have twice as
25 much value in 1990 as ESPN because it has four times

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1 the expenses to the viewing share?

2 A No. What it meant is that in terms of a
3 performance indicator in the market place, that CNBC
4 spent four times what ESPN did to generate the same
5 amount of viewing.

6 Now, the scale is very different. CNBC
7 was spending a small amount; ESPN was spending a very
8 large amount.

9 But in terms of the efficiency in which
10 they converted that programming into viewing, they
11 spent four times to get the equivalent amount, whereas
12 ESPN spent two times, relative to everybody else in
13 the industry.

14 ARBITRATOR WERTHEIM: Mr. Gerbrandt, does
15 your equating programming expenditures with value,
16 rest upon anything more than an inference that the
17 more one is willing to spend in order to acquire
18 something is probably an indication of how valuable
19 they think that thing might be to them?

20 (PAUSE)

21 THE WITNESS: It is true that the more
22 that you spend on programming and you don't generate
23 corresponding viewing, the ratio would certainly go
24 up. If a network were to find a particular program or
25 right that was very expensive and spent it and it

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1 didn't generate an equivalent amount of revenue, it
2 would have valued that right very highly, indeed.

3 ARBITRATOR WERTHEIM: Well, I'm not sure
4 that answers my question. But if that's your answer,
5 then okay.

6 THE WITNESS: Maybe I didn't understand
7 the question fully then.

8 ARBITRATOR WERTHEIM: I am trying to find
9 out whether the assumption in these tables that
10 programming expenditures equates in some way with
11 value rests upon anything more than an arguably
12 rational inference.

13 That one's expenditures are a pretty good
14 indication of what value one hopes to get in return.

15 THE WITNESS: I think that is a fair
16 statement. Especially since networks buy programming
17 to generate viewing so that they can sell advertising.

18 They also need to buy programming so they
19 exist and are able to charge license fees.

20 ARBITRATOR WERTHEIM: That is all part of
21 what you get in return.

22 A That is correct. So, the presumption is
23 that you are always trying to buy programming that
24 will generate the highest ratings or the highest value
25 for your network.

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1 ARBITRATOR FARMAKIDES: Now, I have a
2 related question. Aren't they all, all of the cable
3 networks, if you will, looking for viewing? I mean
4 they are looking to get the maximum viewing possible.

5 Nielsen measures viewing as I understand
6 it. So aren't they all looking for viewing? Isn't
7 there then a relationship between viewing and value?

8 THE WITNESS: The -- If that were true,
9 it is not a simple equation because different of
10 programming perform very differently.

11 I used the weather example earlier. Let's
12 take CNN.

13 CNN could chose to put twice as many
14 reporters out in the field at twice the cost to
15 acquire that news. In that category, doubling the
16 amount of programming costs would make their ratio go
17 up but it wouldn't necessarily double the amount of
18 viewing.

19 ARBITRATOR FARMAKIDES: Well, I'm looking
20 now, at the amount of viewing. Desert Storm, for
21 example, brought an awful lot of viewing, according to
22 your table, to CNN.

23 Isn't that, CNN, a preferred channel, for
24 most people who want to focus in on Desert Storm? And
25 would that channel not then be more valuable than

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1 other channels?

2 A Certainly during that period of time, it
3 was more highly viewed. But that is not the only
4 measure -- viewing is not the only measure of value.

5 ARBITRATOR FARMAKIDES: Yes, that is where
6 I'm failing to understand here.

7 THE WITNESS: Networks have consistently
8 paid additional money for certain categories of
9 programming.

10 ARBITRATOR FARMAKIDES: Say that this
11 morning's newspaper talks about the Olympics. How
12 would you use that as an example of what I'm trying to
13 get at?

14 THE WITNESS: Sure. No, I think it is a
15 cogent question and certainly timely.

16 Networks, in the case of Olympic coverage
17 I know from having followed the last Olympics, that
18 NBC actually lost money. Or at best, broke even on
19 the Olympics.

20 Obviously, networks are in existence to be
21 profitable, to generate returns for their shareholders
22 or owners. It is clear from what NBC has done,
23 irrespective of the past performance, that they very
24 highly value the Olympics and are willing to, one, pay
25 up irrespective of whether they are going to make

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1 money and take tremendous risk. In this case, not
2 even knowing where the sites are going to be located.

3 And believe me, that is a huge issue
4 because of the time delay. I know, I was just over in
5 Hong Kong and it is very disconcerting to be 16 hours
6 ahead or a day ahead and things happening a day ahead;
7 you can't easily have live broadcasts.

8 So, they are taking a considerable risk in
9 that regard. Yet they very highly value that
10 programming irrespective of the viewing level that it
11 may generate.

12 So, there is clearly a different dynamic
13 occurring here.

14 ARBITRATOR FARMAKIDES: But excuse me.
15 They are anticipating a very high viewing level in
16 order for them to absorb that kind of risk.

17 THE WITNESS: Higher than other
18 programming that they might carry. But, considering
19 that they are buying -- If you compare the ratings of
20 Olympics that occurred in the Western Hemisphere
21 versus the ratings of those that occur somewhere else
22 in the globe, because of the lack of live events you
23 have correspondingly lower ratings. That was a real
24 problem with the Seoul Olympics.

25 And the significance of what they did is

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1 the fact that they were willing to bid for programming
2 site, literally s-i-t-e unseen. Realizing that they
3 are taking considerable risk that all the Olympics in
4 the future may be held on the other side of the globe
5 and they are going to have to contend with the fact
6 that they may have lower ratings for that.

7 Yet, they chose to value the programming
8 disproportionately higher. Or take that inherent risk
9 that the viewing might be lower. That indeed,
10 could be lower.

11 ARBITRATOR WERTHEIM: Mr. Gerbrandt, you
12 said a moment ago that in your view that NBC had
13 either lost money or broken even on the previous
14 Olympics.

15 THE WITNESS: Yes.

16 ARBITRATOR WERTHEIM: Was that taking into
17 account only their cost of program acquisition and
18 production?

19 THE WITNESS: That was their cost. The
20 cost of acquiring the rights and then the cost of
21 producing the events.

22 ARBITRATOR WERTHEIM: And acquired what in
23 return for that cost?

24 A They did two things. One is they sold
25 advertising against the commercial availabilities.

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1 And that was an Olympics that was unique in that you
2 might recall that they held something that was called
3 the triple-cast which was available on the pay-per-
4 view. There were three channels, something in excess
5 of \$100 did not do particularly well, financially.

6 ARBITRATOR WERTHEIM: Are you taking
7 anything other than advertising revenue into account
8 on the income side?

9 THE WITNESS: What they got was the
10 advertising plus, I think it was about 50 million
11 dollars out of the triple-cast. It was actually a
12 guarantee.

13 ARBITRATOR WERTHEIM: Well, following up
14 on Judge Farmakides' question relating to today's
15 newspaper accounts, those accounts suggest several
16 aspects of value to NBC beyond what advertising
17 revenues going to NBC.

18 They suggest, for example, that the summer
19 Olympics gives them an opportunity to insert
20 promotional plugs for all their Fall programming and
21 for specials.

22 It also suggests that, this is not
23 addressing solely broadcasts on NBC affiliates; they
24 own CNBC and they suggest five of six other cable
25 systems that may cover all or part of this, and in

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1 some fashion NBC will derive revenue or some other
2 advantage from that.

3 Which is a long-winded way of asking to
4 what extent you take account of such factors in
5 equating its program expenditures with value?

6 A I'm not entirely sure I understand the
7 question.

8 ARBITRATOR WERTHEIM: NBC finds value in
9 a whole lot of other related things including their
10 related cable network and a number of other spin-offs
11 and in program plugs for other programs.

12 Do you take any of that into account when
13 you simply equate program expenditures with value?

14 THE WITNESS: You make a very interesting
15 point. Let me see if I can explain a couple of
16 issues.

17 One, if uses other of its networks to
18 carry some of its programming, what it is doing then
19 is allocating some of the costs to the networks which
20 they will then hope to generate advertising revenue.
21 So, it is just another form of selling advertising.
22 Indeed, it is advertising.

23 That is number one.

24 Number two. Yes, the network does use the
25 Olympics as a time to promote its Fall schedule.

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1 One of the things that we as consumers,
2 casual viewers, forget about promotion is that every
3 time that they use one of those spots, one of those
4 avails to promote their own programming, there is an
5 opportunity cost to that.

6 I think, I apologize if I don't have this
7 number correct, I think I read a report that sales for
8 the Olympics in Atlanta were going for 400,000 dollars
9 per 30 second spot.

10 That means that every time that they promo
11 one of their own shows, they are giving up or in
12 effect paying themselves 400,000 dollars, or a high
13 number for giving up the opportunity cost to sell that
14 spot to someone else.

15 So, they are making an investment -- they
16 are in effect, increasing their marketing and
17 promotion budget for the network.

18 There is indeed, a real cost associated
19 with that in that, in effect, they are paying
20 themselves that advertising money that they could have
21 generated had they not promoted their own show.

22 CHAIRPERSON JIGANTI: Mr. Gerbrandt, I'm
23 concerned about the inference that you draw on page
24 25, that there is more than twice as much value.
25 Could we just as well draw the inference that they are

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1 poor business men and they are paying too much for
2 their programming?

3 THE WITNESS: No, because certain
4 programming categories simply cost more than others.
5 Certain categories, because of their uniqueness have
6 more value than others.

7 CHAIRPERSON JIGANTI: You said it cost
8 more then you said -- you use interchangeably more
9 value than others. You seem to be equating cost and
10 value very directly; different ways of saying the same
11 thing.

12 THE WITNESS: If I am willing to pay more
13 for something, I value it higher.

14 CHAIRPERSON JIGANTI: So, that is the
15 logic that you use in making the statement on page 25
16 that the value is higher because you are willing to
17 pay more.

18 THE WITNESS: That is correct.

19 CHAIRPERSON JIGANTI: Now, in looking at
20 these numbers though, do they really mean anything?
21 Because they measure relative values within a very
22 narrow range of 16 stations as opposed to real values,
23 which would be based, it seems to me, on income rather
24 than cost. Does this bring in more income?

25 THE WITNESS: Let's step back for a moment

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1 and understand what, ultimately, we are trying to
2 accomplish here.

3 CHAIRPERSON JIGANTI: Accomplish what you
4 said over on page 5, the purpose of your report, I
5 gather.

6 A Yes. What we are trying accomplish here
7 is establish -- this is a classic economic analysis in
8 which, on one hand you have a distant signal market
9 place that has an aberration in it. There is a break
10 between here and here.

11 Our goal in studying these networks, in
12 ultimately doing the subset analysis where we focus in
13 on the mix of programming, is to understand what the
14 value chain is by looking at a comparable and
15 analogous market place.

16 You do the same things, the super stations
17 by from program owners and they may pay up for certain
18 categories and down for others.

19 The same thing here.

20 And there is also this value chain occurs
21 down here. It occurs here, but there is this break in
22 this chain, all the way through.

23 We are trying to understand, create a
24 comparable marketplace to this over here. And one of
25 the ways, one of the ratios, one of the measures we

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1 have done is to look at this relationship between what
2 cable networks are willing to spend and the kind of
3 viewing that they generate.

4 CHAIRPERSON JIGANTI: Well, that's the
5 concept you are trying to effectuate, but the
6 conclusion that you draw on page 25 in the thing that
7 confounds me. It seems to rest on your assertion that
8 it is more valuable because they spent more money for
9 it, but I guess you don't say the same thing about
10 CNBC here which has a 4.2 ratio. You draw a different
11 conclusion in that subset of circumstances because it
12 is a start-up cost?

13 THE WITNESS: That is probably an
14 aberration in the fact that it is so high in that
15 year. If you take a look at it in succeeding years,
16 it very quickly falls down. By 1992, they are --
17 that's dropped by two-thirds.

18 What CNBC -- At the same time, this is
19 something I happen to know, financial programming has
20 a much smaller viewing base.

21 CHAIRPERSON JIGANTI: No, CNBC apparently
22 doesn't have any with NBC. It's a news, business
23 channel?

24 THE WITNESS: It is a business news
25 channel.

1 CHAIRPERSON JIGANTI: A business news
2 channel.

3 THE WITNESS: And unfortunately it is on
4 during the day when most are at work. So, it has a
5 bit of a handicap. So, it is trying to get investors
6 that are at home or who happen to be watching
7 television during the day.

8 Financial news, relative to its audience
9 base, is expensive to produce. So, even if it weren't
10 a start-up, I would expect their ratio to be somewhat
11 higher.

12 They translate that higher expense, in
13 terms of being able to charge, they hope, a higher
14 rate to advertisers. But that's a different set of
15 transactions.

16 Nonetheless, that programming is more
17 expensive to produce relative to the viewing level
18 that it generates. Or it costs them more. They value
19 that programming higher than the viewing level it
20 generates.

21 CHAIRPERSON JIGANTI: Then my last
22 question on this and then we will go back over to Mr.
23 Lane.

24 In your making your statement on page 25
25 that more than twice as much value is a component of

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1 your assessment that you know brings in more income.

2 THE WITNESS: No, because we didn't look
3 at income in this. We looked at what they spent.

4 CHAIRPERSON JIGANTI: Solely looking at
5 what they spent you can draw the conclusion that it
6 has more than twice the value, but you don't do the
7 same thing with some of the other programs on. Or at
8 least the one that we talked about, CNBC.

9 THE WITNESS: We just cited that as an
10 example. We could have made the same statement that,
11 for instance, the reverse -- TNT spent -- or their
12 ratio was 1.6. They spent 1.6 times to acquire their
13 programming than the relative viewing level it
14 generated.

15 On the flip side, BET, spent less on its
16 programming than the viewing level it generated.

17 CHAIRPERSON JIGANTI: I read those, but
18 the conclusion from those numbers is the thing that I
19 am having difficulty with.

20 ARBITRATOR WERTHEIM: I have a couple of
21 questions, if you don't mind.

22 Are you suggesting, Mr. Gerbrandt, that it
23 is just coincidence that the example you happened to
24 pick with ESPN which in heavily sports programming?

25 THE WITNESS: It is, aside from CNBC,

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1 which I would say is a special case, ESPN is the
2 highest number on the list, across the board.

3 ARBITRATOR WERTHEIM: On a related
4 question, as I understand this whole mode of analysis
5 it is to provide an analogy to the simulated market
6 place that we are supposed to estimate for the value
7 of distant signals, is that correct?

8 THE WITNESS: Ultimately, what we did,
9 especially on pages 25, 26 and following, is where we
10 created the simulated for the analogous market place.

11 ARBITRATOR WERTHEIM: Now, in an actual
12 free market where the parties are negotiating, are
13 they able to foresee exactly what the revenues are
14 going to be as a result of the view?

15 THE WITNESS: In my experience, program
16 buyers are extremely aware of the viewing levels that
17 they expect from a given category of programming.
18 They do indeed take those kinds of things into account
19 and many of them do very extensive financial modeling
20 in that regard.

21 ARBITRATOR WERTHEIM: Granted, that may be
22 the case, but it is still a matter of how accurately
23 they can look into their crystal ball, isn't it?

24 THE WITNESS: The network that doesn't do
25 that on a consistent and long-term basis doesn't stay

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1 in business.

2 ARBITRATOR WERTHEIM: Well, obviously they
3 would take into account their experience in prior
4 years and what worked out well and what didn't.

5 But at any given moment in a negotiation,
6 aren't they pretty much estimating what they think the
7 outcome is going to be for various negotiating terms.

8 THE WITNESS: Absolutely. Just as we
9 discussed earlier that NBC is taking considerable risk
10 in paying out for the Olympics rights.

11 ARBITRATOR WERTHEIM: Well, a moment ago,
12 Judge Jiganti asked the question relating to whether
13 ESPN might just have been poor business men who
14 overspent.

15 I am trying to focus on that context is
16 whether there is any significant difference between
17 the value which is estimated at the time of the
18 negotiation and the value that has actually been
19 realized once the year is over and you see what the
20 results have been?

21 THE WITNESS: Yes, I suppose that could
22 occur. In the case of a cable network, they also
23 generate value from carrying particular categories of
24 programming from cable operators. They have to.

25 If you chartered yourself as a weather

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1 channel you have to go out and deliver weather; you
2 can't do something else.

3 If you chartered yourself as a general
4 entertainment network, that is the business that you
5 are in and you go out and acquire the best programming
6 because that is what your affiliation agreement calls
7 for and you want to generate ratings.

8 If you are a sports network you want to go
9 out and acquire programming. And remember you are
10 doing so, not in an isolated place, you are doing so
11 in a competitive market place. If you don't acquire
12 that programming, somebody else will.

13 ARBITRATOR WERTHEIM: But if all your
14 forecasting were perfectly accurate you could foresee
15 the results of every deal, that would make it pretty
16 easy for everybody to be a successful business man,
17 wouldn't it?

18 THE WITNESS: Yes. Unfortunately life is
19 not quite so kind to always be quite so predictable.
20 And certainly there are cases where they buy unwisely
21 or make decisions that don't work out.

22 I would maintain, that over a long period
23 of time, you don't stay in business if you do that
24 consistently.

25 ARBITRATOR WERTHEIM: I have one last

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1 question. On programs, so far as exhibit 27 which is
2 the same as the page 24 but with the industry average
3 figures put in. Would you attach any significance to
4 the industry average figures shown on that exhibit?

5 THE WITNESS: No. One of the things you
6 learn in analysis, there are times when an average of
7 an average doesn't mean anything. You can actually
8 get a distorted view.

9 The reason for that is if you have one
10 number in that group that is very large, it will
11 inflate the average. This is something that I
12 confront on a regular basis.

13 In this case, CNBC's numbers distort the
14 average and there is clearly -- If you really wanted
15 to do an average you'd need to do a weighted average
16 and you would have to figure out a weighting factor
17 for it.

18 ARBITRATOR WERTHEIM: So, you wouldn't
19 infer that, looking at the industry as a whole, that
20 program spending equates pretty closely to viewing?

21 THE WITNESS: I would say that while you
22 can mathematically do this calculation, it is not a
23 correct calculation to do. And this occurs rather
24 frequently.

25 One of the rules I teach the analysts who

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1 work for me is be very careful when you take an
2 average of an average, and indeed you are going to
3 come up with a non-sensical number when you do that.

4 ARBITRATOR WERTHEIM: Thank you.

5 CHAIRPERSON JIGANTI: Mr. Lane, it's about
6 time for a break. Can this be continued?

7 MR. LANE: Certainly.

8 CHAIRPERSON JIGANTI: Okay. We will take
9 a ten minute break.

10 (Whereupon, the proceedings recessed at
11 10:51 a.m.)

12 CHAIRPERSON JIGANTI: You may proceed, Mr.
13 Lane.

14 MR. LANE: Mr. Gerbrandt, would you look
15 at the top of page 24, first paragraph.

16 Isn't what you're trying to show in this
17 table that if we just looked at viewing hours we
18 couldn't tell what the value was, and isn't that what
19 the second sentence on page 24 says?

20 THE WITNESS: We couldn't determine the
21 value of the programming merely by looking at the
22 viewing alone, that is correct.

23 MR. LANE: And that's what you're
24 attempting to show by the ratio of the program
25 spending to viewing, and then as we'll get into it

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1 later, as the affiliate fees to the viewing, correct?

2 THE WITNESS: Correct.

3 BY MR. LANE:

4 Q And so in that sense a 1.0 would say to
5 you, would it not, that, yes, you could tell the value
6 from just looking at viewing hours?

7 A I don't understand how you get to that.
8 You have to look at programming costs relative to
9 viewing it generates, not just at the viewing.

10 Q Okay. Let me try and help you out.

11 You say in the second sentence on page 24,
12 that ESPN paid more of its revenue on acquiring and
13 purchasing programming than it would have had the only
14 determinant of value been viewing hours, right?

15 A Correct. Okay, I see where you're -- Let
16 me -- For instance, if you'll look at the chart for
17 1990 --

18 Q Which chart? You better tell us what page
19 you're on.

20 A It's page B-2 -- I'm sorry. Table B-2 on
21 page 21. If you'll go down and look at ESPN we see
22 that --

23 Q This is the bar graph chart?

24 A That is correct.

25 CHAIRPERSON JIGANTI: On what page?

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1 THE WITNESS: Page 21, Table B-2. And we
2 look at ESPN.

3 Had its only determinant been viewing
4 percentage, which in this case is 12 percent of all
5 the viewing of this group of networks, it would have
6 been just 12 percent. However, of all the programming
7 for these networks it was spending almost 26 percent
8 of all the programming represented by this group of
9 16 networks. So when you do the analysis it's clearly
10 had the only determinant of value been viewing it
11 would have been 12, but when you take into account the
12 relative, the relationship between the program cost
13 and viewing in this case it's anywhere from 2.2 to 2.7
14 two to three times it's relative viewing level.

15 MR. LANE: Right. But if you had 1 that
16 would say to you that if programming expenses were the
17 value that viewing hours would be an accurate measure
18 of that, right, as you've calculated expenses in
19 viewing in your report?

20 THE WITNESS: What it would mean would be
21 that, if you had -- I think by definition if you have
22 a ratio of 1, the share of viewing and the share of
23 programming expenditures are equal.

24 BY MR. LANE:

25 Q And in fact if the programming expense

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1 were a measure of value that you could infer that
2 measure of value by looking at the viewing hours,
3 correct, in the 1.0 ratio, in fact it would be exactly
4 the same?

5 A Only in that instance would they be equal.

6 Q Now could you turn back for a moment to
7 Program Suppliers, Exhibit 27-X. That's the one page
8 chart. Do you have that with the average at the
9 bottom?

10 A Yes.

11 Q Let's say I added up all the numbers, I
12 added up all the program expense dollars, and that
13 would equal a hundred percent, wouldn't it?

14 A No.

15 Q If I added up all the program expense
16 dollars for the 16 networks it wouldn't equal
17 100 percent of the expenses for the 16 networks?

18 A It would equate to 100 percent of the
19 expenses; it wouldn't add up to 100 percent. It would
20 add up to whatever the figure was, \$1.2 billion.

21 Q Right. It would add up to \$1.2 billion.
22 And then if I was going to translate that as you did
23 on page 20 to a percentage the percentage would have
24 to be necessarily be 100 percent, right?

25 A That is correct.

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1 Q Right. And if I did the same thing with
2 the viewing, if I started with the unweighted viewing
3 numbers and added them all up for the 16 networks,
4 then I made a percentage of that total, that would
5 have to be 100 percent, wouldn't it?

6 A That is correct.

7 Q And so if I did that sort of kind of a
8 weighted average wouldn't I by definition get an
9 average of 1.0 across the bottom?

10 A That is correct. You'd be dividing 100 by
11 100, which is why this is not -- this is a
12 nonsensical, an incorrect way to approach the
13 calculation, because to do the calculation the same
14 way all the way down to get a weighted average you
15 would divide 100 by 100 and come up with 1.

16 Q Right. And that's by definition. I mean
17 what's the point of doing this?

18 A I don't know why you did this.

19 Q Well, I'm sure you're going to find out,
20 Mr. Gerbrandt.

21 A Okay.

22 Q Let's just stay with the chart on page 24
23 for a minute, and I'd like you to keep your eyes on
24 pages 51 and 52 at the same time. And those are the
25 raw data from which you got these ratios, correct?

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1 A That is correct.

2 Q Now just let's look at the CNN line. Now
3 in your estimation is being below 1 percent less
4 desirable, does that mean it's less valuable
5 programming? On the chart that you show in 24, is
6 that the meaning of the low 1 percent?

7 A Relative to the viewing that it generates,
8 yes.

9 Q Okay. Now let's look at CNN. In 1990
10 they have a .9 ratio, correct?

11 A Correct.

12 Q And then in 1991 they have a 1.6 ratio,
13 correct?

14 A Correct.

15 Q And then they go back up to .9 in 1992,
16 correct?

17 A Correct.

18 Q Now does that mean that in 1991 the
19 programming was less valuable on CNN than in 1990 or
20 '92?

21 A No. Let's go back and remember the logic
22 chain of how we described value. Value is synonymous
23 with what it cost to produce. In other words, the
24 more it cost the more highly it would be valued. What
25 we then did was determine how, look at how that cost,

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1 how that value related to the viewing it generated.

2 In the case of CNN, which is essentially
3 a fixed cost operation they are not going out and
4 bidding for programming. They are creating. They
5 have reporters out and operate bureaus. They got more
6 viewing in '91 for the dollars that they spent to put
7 the news on the air, and the ratio therefore went
8 down.

9 Q Would you look at page 51, please? Do you
10 see CNN had its program expense went up from 1990 to
11 1991 by almost \$25 million?

12 A Historically cost of operations has been
13 going up about 10 to 15 percent a year, but especially
14 in '91 as they increased the amount of the -- they had
15 considerable costs going out in covering Desert Storm.
16 They've also been opening more bureaus. And the
17 anchors want salary increases.

18 Q Right. But if we looked at the program
19 expense it would suggest that the value went up,
20 correct?

21 A That is correct.

22 Q But if we look at your ratio it would
23 suggest that the value went down, right?

24 A No, what it suggests is that they got, in
25 that year they got just proportionately more viewers

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1 for a slightly higher value of programming.

2 Q In other words their expectations turned
3 out to be lower than what the reality was in that
4 year. Would that be a fair way of saying it?

5 A No, their viewing level was higher than
6 whatever their expectations ordinarily would have
7 been.

8 Q Right. So the reality of their viewing
9 was higher than what they had expected and therefore
10 their ratio went down?

11 A I don't think they could have anticipated
12 Saddam Hussein invading Kuwait.

13 Q Right. And isn't that the same sort of
14 reasoning that applies when we look at CNBC across the
15 way, that what we're seeing is their expenses are
16 moving into their expectations?

17 A I think their viewing levels are moving
18 into their expectations, for which they bought the
19 programming or created programming.

20 Q Let's look at "NICK". You see NICK down
21 there? And that's one that you've cited in your
22 testimony, isn't it?

23 A I've cited most of them.

24 Q Just look right above the chart on page 24
25 and you cite Nickelodeon. And then if you turn to

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1 page 25 in the last sentence of the first paragraph
2 you cite NICK again. Nickelodeon is NICK, right?

3 A Correct.

4 Q So there, particularly on page 25, you say
5 that the value of the programming was only half its
6 viewing share.

7 A Its proportionate share of total viewing,
8 that's correct. I mean that's exactly what we said
9 was the proportionate share of viewing. That's the
10 important point. Certain program categories are
11 inherently less expensive than others. Conversely
12 certain program categories are more expensive than
13 others to either create or acquire.

14 ARBITRATOR WERTHEIM: How would that
15 suggest that the value is more? Because you get more
16 to your bottom line if you can achieve it at less
17 expense.

18 THE WITNESS: If you can achieve more
19 viewing at less expense you would probably have a
20 richer cash flow margin as a result of that.

21 ARBITRATOR WERTHEIM: So doesn't the kind
22 of programming that would generate that material,
23 isn't that pretty valuable to you for your system?

24 THE WITNESS: The problem is that there is
25 a lot more of that kind of programming available than

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1 there is of the expensive kind, that's why it's less
2 expensive. The news is a classic example. I'm sorry,
3 weather. I mean weather is readily available
4 information. The problem is you can only do really
5 one weather channel; you don't need five of them.

6 ARBITRATOR WERTHEIM: But if your object
7 is cash flow and maximizing your revenues you're
8 better off getting the cheaper program that generates
9 more revenue, aren't you? Because it has the larger
10 ratings.

11 THE WITNESS: If that were the only
12 determinant, Your Honor, you'd probably be correct.
13 The fact is cable operators don't want to just carry
14 cheaply program channels; they must -- to be able to
15 in turn charge their subscribers they need to have
16 high value programming.

17 ARBITRATOR WERTHEIM: We keep coming back
18 to a whole series of lines and questions and always
19 the problem we bring up is, derived from your equating
20 value with cost.

21 THE WITNESS: Well that's a key
22 determinant of value in the programming business.

23 ARBITRATOR WERTHEIM: Wouldn't it be
24 simpler to say, it's not really an equation, it's just
25 a pretty good indication of what somebody thought

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1 would be valuable to them, and then there would be
2 other factors that also effect that thinking.

3 THE WITNESS: There aren't.

4 ARBITRATOR WERTHEIM: Including viewing.

5 THE WITNESS: Including viewing. But
6 viewing alone is clearly not the only issue here.

7 ARBITRATOR WERTHEIM: You're not
8 suggesting that cost alone is the proper determinant,
9 are you?

10 THE WITNESS: No. And that's why we've
11 done the analysis of taking cost in relation to
12 viewing.

13 ARBITRATOR WERTHEIM: I'm sorry.

14 CHAIRPERSON JIGANTI: A person looking at
15 this chart, are they suppose to draw any inference
16 from it just from the chart itself? Something is
17 good, something is bad, relationships are good or bad,
18 just by looking at the chart?

19 THE WITNESS: What this chart shows is
20 which program categories, or which networks spent more
21 of their resources, their revenue, to acquire
22 programming than the viewing it generated. That is
23 what this chart is intended to show.

24 CHAIRPERSON JIGANTI: And that's all? Or
25 to draw no conclusions concerning value from this

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1 chart?

2 THE WITNESS: On a relative basis the
3 networks that have higher ratios valued that
4 programming higher than the viewing that it generated.

5 CHAIRPERSON JIGANTI: So that's what this
6 chart is to do; to show that they valued it higher.
7 And then what do we do then with NICK, what conclusion
8 do we draw in the reverse or count in this area?

9 THE WITNESS: In this case NICK got a lot
10 more viewing for its programming.

11 CHAIRPERSON JIGANTI: And that's the only
12 conclusion we're to draw from this chart and that's
13 the purpose of this chart? ESPN got less for their
14 dollar in viewing and NICK got a lot more for their
15 dollar, and we shouldn't do any more with it than
16 that?

17 THE WITNESS: It is an indicator of the
18 relationship between program value and viewing
19 generation, that is correct.

20 CHAIRPERSON JIGANTI: Why do we care about
21 the relationship between those two? Or maybe that's
22 beyond what you've been called upon to do. As I read
23 the beginning of your report when it says what you're
24 called upon to do. I'm doing what Mr. Garrett has
25 suggested before, I'm asking a competent question and

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1 I shouldn't do that.

2 Let me withdraw the question.

3 MR. LANE: Okay. So, when you use value
4 on page 25, that means the amount paid to acquire and
5 produce that program.

6 THE WITNESS: I'd use the term value in
7 that regard, yes.

8 MR. LANE: And that's how you define it on
9 page 25, right? And the second sentence at the top of
10 the page?

11 THE WITNESS: Yes.

12 BY MR. LANE:

13 Q Are you suggesting that is "the"
14 marketplace value?

15 A ESPN goes out and buys that programming in
16 the open marketplace. As I said earlier, these are
17 not isolated transactions. ESPN and the rest of the
18 networks are going out and acquiring programming and
19 negotiating for it with multiple competitors, so it is
20 reflective of a marketplace transaction, yes.

21 Q But is it "the" marketplace value? Isn't
22 it equally valid to look at this as the chairman did
23 and say, ESPN spent a lot of money and really didn't
24 get very much for it, and whatever it is, the converse
25 or reverse is that Nickelodeon didn't spend very much

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1 and got a lot of value for that?

2 MR. GARRETT: Objection to the form of
3 that question.

4 MR. LANE: Let's stick with ESPN. Isn't
5 it equally plausible to say that ESPN spent a lot of
6 money and got very little value for the programming?

7 THE WITNESS: No, because it generated
8 revenue against that. It generated in a valuable
9 demographic which advertisers prize highly.

10 MR. LANE: Is it fair to say that NICK
11 spent very little and got a very high value for what
12 it spent?

13 THE WITNESS: No, it got a high level of
14 viewing. Unfortunately advertisers don't value kid
15 viewers in the same way that they value adult male
16 viewers.

17 ARBITRATOR WERTHEIM: Does this tell us
18 anymore than that ESPN had to have a rating card
19 higher than NICK in order to break even?

20 THE WITNESS: Well that's one of
21 the -- that would logically derive. Of course it's
22 not the goal just to break even, but to make money; to
23 generate positive cash flow. It's not the only but
24 it's an additional conclusion that can be drawn from
25 it.

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1 ARBITRATOR WERTHEIM: And if they think
2 their audience is such as to appeal to advertisers who
3 will pay more, they're just doing the same thing that
4 NICK is, aren't they? Adjusting their demands for
5 advertising rates to the audience value as seen by
6 advertisers?

7 THE WITNESS: You are correct in that
8 advertising rates are often a reflection of the value
9 advertisers place on certain types of demographics
10 that the programming generates.

11 ARBITRATOR WERTHEIM: So ESPN has to
12 appeal to the more highly valued audience in order to
13 make money than NICK does?

14 THE WITNESS: Correct. Therefore it has
15 to buy programming that appeals to that audience. In
16 this case sports programming is just expensive because
17 of its unique nature.

18 CHAIRPERSON JIGANTI: Mr. Gerbrandt, let
19 me explain my problem. Here's my observation
20 concerning this, and if you want to comment on it --

21 It seems to me as long as you use the
22 ratio as an indicator, it's not the sole determinant
23 of value. But you seem to make it a sole determinant
24 of value when you say it is the value, it's valuable
25 on page 25 referring to this chart.

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1 THE WITNESS: It is not the sole
2 determinant of value because we clearly, we have done
3 other ratio analyses here.

4 CHAIRPERSON JIGANTI: You need to know the
5 income generated of this also.

6 THE WITNESS: If you were ultimately
7 trying to get to the value of ESPN and Nickelodeon and
8 what those assets would sell for in the marketplace,
9 but what we're trying to focus on is the relative
10 value of programming here, both to the networks and
11 then to the cable operators, so we've done a similar
12 set of analyses on affiliate license fees, so various
13 conclusions can be drawn from --

14 What we're trying to do is understand how
15 the networks value the programming.

16 CHAIRPERSON JIGANTI: I believe I
17 understand the concept, I just don't understand the
18 implication in this situation. I've been dominating
19 this too much and I'll turn it back to Mr. Lane again.

20 Mr. Lane.

21 MR. LANE: Thank you.

22 Isn't what you're trying to do on page 24
23 is show that value as you've defined it can't be
24 determined by looking at viewing hours? Isn't that
25 what you state at the top of the page?

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1 THE WITNESS: Yes. Viewing hours alone.

2 MR. LANE: Turning to page 25 and to this
3 value question, the way that you define value, could
4 I just substitute this? Instead of saying ESPN could
5 I just say as measured by the amount a cable network
6 actually had paid to acquire and to produce that
7 programming?

8 THE WITNESS: Well the way value was
9 measured by the amount ESPN actually paid to acquire
10 the program.

11 MR. LANE: Okay. But my point is, is that
12 limited to ESPN or is that applicable to all cable
13 networks?

14 THE WITNESS: As we do in the following
15 paragraph, since we didn't want to recite every
16 network we cited NICK. That would apply to each of
17 the cable networks.

18 MR. LANE: At this time, Mr. Chairman, I'd
19 like to introduce Exhibit 28-X, a one page document
20 that is from Cable TV Programming, and that is a
21 publication of which you're a senior analyst, is it
22 not, Mr. Gerbrandt?

23 (Whereupon, the above-
24 referenced document was marked
25 as PS Exhibit 28-X for

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1 identification.)

2 THE WITNESS: That is correct.

3 MR. LANE: And it's from the September 25,
4 1992 issue. And the article's entitled, "Biggest Bang
5 for the Buck: Program Cost Efficiency".

6 MR. GARRETT: Is this the entire --

7 MR. LANE: This is the entire article.

8 Have you had a chance to look at the
9 article, Mr. Gerbrandt?

10 THE WITNESS: I haven't a chance to read
11 it in detail --

12 MR. LANE: Take as much time as you'd
13 like, please.

14 THE WITNESS: Okay.

15 MR. LANE: Were you familiar with this
16 article before you read it today?

17 THE WITNESS: Yes.

18 MR. LANE: Did you help write it or help
19 perform the analysis or in any way be involved with
20 this publication?

21 THE WITNESS: This goes back enough years
22 that I don't know if I wrote it or one of the analyst
23 who works for me wrote it, but I am ultimately
24 responsible for the article.

25 MR. LANE: And would it be fair to say

1 that this is another way of analyzing value?

2 THE WITNESS: The goal of this was to do
3 a study of program cost efficiency. I mean that's
4 what it states and that's what it is. That's what it
5 does.

6 MR. LANE: Is program cost efficiency a
7 way to measure value?

8 THE WITNESS: In what context?

9 MR. LANE: In the context that you
10 presented it to your subscribers.

11 THE WITNESS: We weren't talking about
12 value, we were talking about programming cost
13 efficiency.

14 MR. LANE: What is programming cost
15 efficiency?

16 THE WITNESS: In this case what we were
17 trying to do was to understand how certain types -- or
18 each network's programming budget, how efficient it
19 was in terms of generating ratings, so we came up with
20 a ratio of programs spending per rating point per
21 hour.

22 MR. LANE: And I take it the lower the
23 number in the right-hand column the more efficient the
24 programmer is?

25 THE WITNESS: Yes. In other words Super

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1 Station TBS was very efficient at converting its
2 program budget into ratings and ESPN in this context
3 was very inefficient, or had very expensive
4 programming relative to the audience it generated and
5 the number of hours of programming it got out of it.

6 BY MR. LANE:

7 Q And if we look at the last paragraph that
8 was the discussion you were just having with Judge
9 Wertheim, wasn't it?

10 A That is correct, that they draw high
11 affiliate license fees and high ad revenue.

12 Q And so is it fair to say you either have
13 to have high affiliate fees and high ad revenues or
14 you got to be efficient to stay in business?

15 A Not necessarily. It doesn't follow. You
16 can have highly efficient programming and high license
17 fees and --

18 Q Make a ton of money.

19 A -- and there are several networks out
20 there that qualify like that.

21 Q Could you look at page 51 of your
22 testimony, please?

23 Now, maybe we could just look at -- For
24 example, let's just look at ESPN on Exhibit 28-X. Do
25 you see that its programming budget, 1992 programming

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1 budget is identified as 395.0, and I take that's
2 \$395 million, correct?

3 A Correct.

4 Q And then if we look at your exhibit in
5 this case on page 51, for the same year you have
6 \$448.5 million, is that correct?

7 A That is correct.

8 Q And could you explain to us why there was
9 that difference?

10 A Certainly. Two reasons. One is if you'll
11 see the publication date, it's September 25, 1992.
12 This analysis was based on --

13 Q When you say this do you mean Exhibit 28-
14 X?

15 A Exhibit 28-X was based on ESPN programming
16 expenses that had been made earlier in the year. It's
17 number one. Number two, so what we normally do is at
18 the end of the year -- In other words it would have
19 been some time in early 1993, we would have gone back
20 and resurveyed the networks and restated '92 numbers
21 to the extent they needed to be restated. So that's
22 likely the difference.

23 Q Are the rating numbers that you present on
24 Exhibit 28-X, are those the type that you regularly
25 retain at Kagan or regularly get at Kagan?

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1 A Those are ratings that are -- Those are
2 numbers that we attempt to collect. As you can see
3 from the e's we don't always get everything we're
4 looking for.

5 Q Right. The "e" means that it was a Kagan
6 estimate, correct?

7 A Correct.

8 Q And is that the same type of Nielsen total
9 day average ratings on which you relied for your
10 testimony here?

11 A We didn't relied on ratings; we relied on
12 actual TV households.

13 Q And so on page 52 of your testimony, is
14 that based on -- What is that based on, page 52? What
15 is that based on?

16 A That is based on the average number of
17 viewing households multiplied by the number of hours.
18 And we went over that calculation earlier.

19 Q And are you looking at Exhibit 25-X?

20 A Yes. What we did was take total day
21 average viewing households, which is the chart -- It
22 has STUVWX across the top.

23 Q Right. The third page in from the front
24 of Exhibit 25-X?

25 A Yes. And then as I recall what we did was

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1 multiply that by the average number of program hours
2 per day.

3 Q But is that ultimately derived from the
4 same numbers that is shown in 28-X in the column
5 "Average 1992 Rating"?

6 A No, we tracked both ratings and TV
7 households, delivered or average TV households as two
8 separate numbers.

9 Q Turning to 28-X for a minute, the
10 paragraph above, as Bob likes to say, the penultimate
11 paragraph on the page --

12 MR. GARRETT: I haven't said that once
13 this proceeding, yet.

14 MR. LANE: See it says "a fractional
15 ratings increase within the existing program budget
16 can dramatically bolster efficiency". And is that the
17 type of thing that we saw with CNN when we went from
18 1990 to 1991 on page 24 of your testimony? Is that
19 the type of phenomenon we're seeing?

20 THE WITNESS: Well they certainly had more
21 than a fractional rating increase as I recall.

22 MR. LANE: But it's the same idea, is it
23 not?

24 THE WITNESS: Broadly, yes.

25 MR. LANE: Unless the panel has some

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1 questions I'm going to switch over to the affiliate
2 license fees.

3 CHAIRPERSON JIGANTI: You may proceed,
4 Mr. Lane.

5 MR. LANE: Thank you.

6 Is it true that the other measure of value
7 in your study that you examined against viewing was
8 affiliate license fees?

9 THE WITNESS: Correct.

10 BY MR. LANE:

11 Q Was I correct in hearing you yesterday
12 that the way that Kagan measures affiliate license
13 fees was in the aggregate? I think you used those
14 words, in the aggregate, two or three times yesterday.

15 Is that accurate? Not whether you said it
16 but whether you collected in that manner?

17 A I'm not sure what you mean.

18 Q Well I was going to ask you because I
19 wasn't sure what you meant.

20 A There are two ways I might have used the
21 term in aggregate. One is what we're looking at in an
22 individual network's license fees, is the aggregate of
23 what all the systems in the country pay it, so that's
24 one way I might have used the term aggregate. The
25 other is that in doing the calculation we would have

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1 taken an individual network's license fees and divided
2 it by the aggregate of that 16 network total. So
3 those are the two ways I probably used the term.

4 Q And as I understand your calculation, and
5 correct me if I'm wrong, let's use A&E for example.
6 You take whatever the total dollar amount of license
7 fees is and divide it by the number of subscribers to
8 A and E and that gives you the cents per subscriber?

9 A I'm not aware that we did that calculation
10 here.

11 Q How did you calculate the license fees
12 that you show on page 50?

13 A We did that in the same way that we
14 acquired the programming and production expenses.
15 First we look at company financial statements, annual
16 reports, we look at press releases, trade
17 publications. We also make our own estimates which we
18 then review with industry executives, and finally in
19 cases where we have no other number we will make our
20 own estimate.

21 Q Now how is the different number of
22 subscribers taken into account in these calculations?

23 A Well first of all the figures are what
24 they are in respective of whatever the size of the
25 network is, irrespective of the number of subscribers.

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1 Q In 1990 we think A&E got \$45 million. Now
2 that \$45 million would have been generated by A&E by
3 collecting a certain amount from each of the systems
4 that you had affiliation agreements with, and those
5 systems obviously have account of subscribers. The
6 number is whatever it was that was collected from all
7 of those systems.

8 Q Well let me ask you this. Let's say that
9 you had two -- This is totally hypothetical. You had
10 two different cable networks, and each of them charges
11 ten cents per subscribers. There's no discount,
12 there's no incentive of any type just for the sake of
13 this hypothetical. One has 10 million subs and the
14 other has 5 million.

15 Now, when you report that you would put
16 down 10 million x 10 cents is, 5 million x 10 cents.
17 One would be twice as large as the other, correct, in
18 total revenues, in my hypothetical?

19 A Actually I'd do a further calculation,
20 but --

21 Q What would be the further calculation?

22 A That fee is per sub per month, so you have
23 to multiply it by 12.

24 Q But you would still get one having twice
25 as much affiliate license fees as the other, correct?

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1 A That is correct.

2 Q Now if I'm an individual cable system, and
3 I'm going to measure value that way, or am I going to
4 say, well, either one is going to cost me 10 cents a
5 sub, and so I'm kind of balancing from that
6 standpoint. To me that's an equal weighting. Is that
7 correct or incorrect?

8 A Well that hypothetical question presumes
9 that that's the only arbiter of value that a system
10 would use.

11 Q That's why it's a hypothetical.

12 A And in reality there are many other
13 factors that go into deciding whether or not a network
14 would be added to a system other than just the fee.

15 Q But what I'm focusing on that case, on
16 Table 50 of my two hypothetical cable networks have
17 been added, one would be shown at double the value of
18 the other, correct?

19 A No, one would be shown as having twice the
20 amount of revenue as the other.

21 Q All right, I'll accept that for now.

22 A I'm glad.

23 Q Would that mean that it had twice the
24 amount of value for cable systems?

25 A No, it meant that it generated twice the

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1 amount of revenue that another network -- It would
2 mean I suppose that twice as many systems found that
3 programming valuable and therefore carried it or had
4 space to carry it at that particular point. I suppose
5 you could make that kind of a statement. But what it
6 really means is that at that particular point in time
7 it was carried, given that the license fees would be
8 identical, what it would mean is that twice as many
9 systems carried it. It could be that it was a brand
10 new network and was early in its growth cycle,
11 therefore had fewer subscribers.

12 Q Now, are license fees the only source of
13 revenues for the programmer, the cable network?

14 A No, I think we've clearly stated that on
15 an industry average basis they generate about
16 60 percent of their revenue from advertising and
17 40 percent from affiliate license fees. Of course the
18 range is all over the board.

19 Q So would license fees show the value of a
20 programming to the cable network?

21 A It is another measure of value.

22 Q I'll give you another hypothetical. What
23 if I had one network that had very low license fee
24 revenues and very very high advertising revenues, and
25 another one that had modest, higher than the first

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1 ones affiliate license fees but very low advertising
2 revenues.

3 Which would be more valuable?

4 A From a cable operator's perspective
5 advertising revenues that the network generates in and
6 of itself is not a factor. The license fee that is
7 paid is often a reflection of either the competition
8 in that particular category or the exclusivity or the
9 cost of the programming that goes into creating that
10 particular network. Well I don't know all the things
11 that cable operators think about when they look at
12 adding a network. What that network generates in ad
13 revenues is not necessarily part of the decision
14 process. I mean that happens outside their purview;
15 that happens at a national level, and they don't
16 always directly participate in that unless they happen
17 to own a piece of that network.

18 Q My question was, which would be more
19 valuable to a network?

20 A Advertising revenue is not part of that
21 value equation.

22 Q To the network, advertising revenue --

23 A To the operator. You asked me to the
24 operator.

25 Q I'm now asking you to the network.

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1 A Okay. That's a very different question.

2 To a network obviously it wants to
3 generate as much advertising revenue as possible. It
4 also wants to generate as much license fee revenue as
5 it can.

6 Q But by just looking at the license fees
7 can I tell which programming is more valuable to a
8 network?

9 A No. You've got it the other way around.
10 It's the cable operators who are paying the license
11 fees, not the -- Now, having said that, networks with
12 high programming costs often charge the highest
13 license fees.

14 Q Well I'm just referring to page 39 of your
15 testimony and you're saying that ESPN had more than
16 twice as much value to cable operators as the share of
17 viewing would indicate.

18 A As measured by the amount cable operators
19 actually paid to carry ESPN.

20 Q And that's the license fee, correct?

21 A That is correct.

22 Q And that's what you've shown on page 50,
23 correct?

24 A Not entirely. This statement is derived
25 from and taking the ratio of affiliate fees to

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1 viewing. So it's not just paid 50, it's page 50 and
2 then doing first the share of affiliate fee
3 calculation on that, and then relating that to the
4 amount of viewing that that network generates.

5 Q But the affiliate license fees part, the
6 raw data for that are found on page 50, correct?

7 A A portion of the calculation is based upon
8 page 50, that is correct.

9 Q And then we go back to our old favorite
10 table on page 15 of the share of viewing revenues,
11 right? You didn't change that for this calculation,
12 did you?

13 A No, I did not.

14 Q And then we go to page 34, and that's
15 where you did the percentage of license fees
16 calculation, right?

17 A Related to I believe as you referenced
18 page 50.

19 Q Fifty, right. And again this is just,
20 looking at page 50, it's dividing the single number
21 for each network in each year by the total number for
22 that year?

23 A That is correct.

24 Q And then you did a ratio, and you have the
25 bars, graphs, but the ratio is on page 38, correct, of

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1 affiliate fees to viewing?

2 A That is correct.

3 MR. LANE: Mr. Chairman, could we go off
4 the record for a second?

5 CHAIRPERSON JIGANTI: Certainly.

6 (Whereupon, the proceedings went off the
7 record at 12:04 p.m. and resumed at 1:02 p.m.)
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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:02 p.m.)

CHAIRPERSON JIGANTI: Mr. Garrett, I
assume this is your witness.

MR. GARRETT: This is actually Ms. Behan's
witness.

MS. BEHAN: Hello. Are we ready?

CHAIRPERSON JIGANTI: Counsel, your name
for the record?

MS. BEHAN: Kathleen Behan.

CHAIRPERSON JIGANTI: Okay. And your
first witness will be?

MS. BEHAN: Mr. Ken Burns.

CHAIRPERSON JIGANTI: Mr. Burns, would you
stand and raise your right hand, please?

MR. BURNS: Yes, sir.

WHEREUPON,

KEN BURNS

was called as a witness by Counsel for the Joint
Sports Claimants and, having been first duly sworn,
assumed the witness stand, was examined and testified
as follows:

CHAIRPERSON JIGANTI: Thank you. You may
be seated.

You may proceed, Ms. Behan.

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DIRECT EXAMINATION

BY MS. BEHAN:

Q Mr. Burns, I'm going to hand you a copy of your written testimony in this proceeding. Mr. Burns, could you tell me what your current position is?

A I am an independent film maker. I am essentially self-employed.

Q Okay. And do you make documentaries?

A I am the producer and director of educational documentary films, who have their primary outlet on public television.

Q Okay. And was one of your documentaries an 18-hour series on the game of baseball?

A Yes, 18-1/2 hours.

Q Okay.

A As many critics pointed out.

Q Okay. Can you tell me why you decided to do a documentary about the game of baseball?

A I have been animated throughout my film career, which is about 20 years, in trying to understand the essence of who we are as a people. That is to say, I've been engaged in studying our country and what makes Americans who they are, the strange and complicated people who at least like to call themselves Americans.

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1 And I felt at this point in my
2 professional life that I could have no other subject
3 that would reveal to me the depths of that question,
4 if not answer them, than this story of baseball.

5 Q Okay. And what types of tasks did you
6 undertake to do that documentary about baseball?

7 A Contrary to the popular view that film
8 production is a glamorous enterprise, the kind of
9 films that we engage in are essentially large,
10 scholarly explorations, involving years of research,
11 interviews, consultation with legitimate scholars,
12 sort of pain-staking research at archives, and
13 covering thousands of photographs, and news reels,
14 reading hundreds of books on the subjects, going to
15 original sources, conducting interviews, filming at
16 appropriate locations, and then, the most difficult
17 task, to distill that material into some coherent form
18 that could be vaguely described as popular or for
19 popular consumption.

20 Q And who are some of the types of
21 individuals that you were able to actually interview
22 in the course of preparing this documentary?

23 A Well, in addition to the obvious people
24 that one would think you would approach in the case of
25 a documentary on the history of baseball, that is to

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1 say players and scouts and managers, we felt it
2 incumbent upon ourselves to pursue the story of
3 baseball with the experts, the historians, the
4 newspapermen, the columnists, the journalists, and the
5 fans who have really been affected by the game and
6 may, in fact, be a lot better qualified to talk about
7 it than to play it.

8 Q Okay. Now, would you consider yourself a
9 fan, too?

10 A Absolutely. It was one of the added
11 pleasures of working on the project, which was to be
12 able to get paid as modestly as we are in public
13 television for something you love to do, which is
14 think about play and do the game of baseball.

15 Q Okay. Well, now, before I get into the
16 heart of your testimony, I want to go over a few more
17 questions as to your qualifications. Can you tell me,
18 what kind of awards did the baseball documentary win?

19 A Several we're very pleased to say. It won
20 a 1994 Emmy award for outstanding informational
21 special. It -- for the first time in the history of
22 the Television Critics Association, which I think is
23 in excess of 25 years, it is the only program to have
24 won two awards in one year, Outstanding Achievement in
25 Sports and Outstanding Achievement in Specials.

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1 It has won a Golden Reel award. It has
2 been nominated for another Emmy. It has won the
3 Parents' Choice award, and it was named the Best of
4 the Year from Time magazine, People magazine, and TV
5 Guide. It received a Golden Apple award from the
6 National Educational Media, the Clarion award, the
7 Homer award. It was screened at the prestigious
8 Telluride Film Festival as its debut and won a CINE
9 Golden Eagle award, among others.

10 Q Okay. And was it a widely watched
11 documentary?

12 A The baseball series is the most watched
13 program in the history of public television.

14 Q Now, can you tell me about, just real
15 briefly, about some of the other documentaries that
16 you have worked on in the past or are working --

17 A I've been making historical films since
18 the mid 1970s, but principally my works include
19 biographies for public television on the history of
20 the Brooklyn Bridge, the Statue of Liberty, the
21 religious sect, the Shakers, the turbulent southern
22 demagogue, Huey Long, history of the Congress in which
23 I spent a lot of time in this building, as well as a
24 massive history of the Civil War, history of early
25 radio, and I'm currently working on several more

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1 documentaries.

2 Q Okay. I notice that most of those
3 documentaries have to do with American cultural
4 institutions like baseball, is that correct?

5 A Sometimes I feel like I am Samoa or Guam.

6 (Laughter.)

7 That is to say, an American possession.

8 (Laughter.)

9 I -- I cannot imagine doing a subject that
10 does not have as its -- at its center the sort of guts
11 of who we are, and that's what I have been about, and
12 -- and I assume will continue to be about.

13 Q Okay. Now, Mr. Burns, at this time, I am
14 going to offer your testimony up to the panel for
15 potential voir dire from anyone.

16 CHAIRPERSON JIGANTI: Questions?

17 MS. BEHAN: Okay.

18 BY MS. BEHAN:

19 Q Mr. Burns, in this proceeding, we are
20 focusing on the value of baseball as a -- and other
21 sports generally as a relative matter compared to
22 other types of programming on distant signal
23 programming. Are you aware of that?

24 A Yes, I am.

25 Q Okay. So, Mr. Burns, can you briefly

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1 explain to me why you believe that baseball and sports
2 generally has a particular value to the American
3 television viewing public that far exceeds other forms
4 of televised entertainment such as movies and
5 syndicated programming?

6 A I believe that that is true and for a
7 number of reasons. I think that sports, and baseball
8 in particular, but sports in general are a really
9 powerful intersection in our culture between fact --
10 that is to say, who won the game, how did they bat,
11 what was the box score -- and metaphor. And that is
12 to say that we endow our sports games with a
13 significance well beyond their -- their literal
14 importance, and that is what draws me to baseball.
15 Because sports occur over time, they mirror precisely
16 the country and the history that we have.

17 So as the poet William Blake said, you
18 could find the universe in a grain of sand, I sort of
19 felt you could find the American soul in sports. You
20 can -- you can look into this intersection of fact and
21 metaphor and learn a lot about who we are.

22 I think that its value is essentially
23 intrinsic rather than extrinsic. We're influenced,
24 we're bombarded as we know, particularly on
25 television, by so many influences -- pernicious ones,

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1 obscene ones perhaps, commercial ones. It's a
2 constant bombardment, and we pick up a lot of signals.
3 We sometimes dress, we comb our hair the way the
4 movies tell us. We -- we do a lot of things taking a
5 kind of extrinsic influence from our modern culture.

6 It seems to me that sports, and
7 particularly baseball, have to do with something more
8 intrinsic. We are identified with sports teams
9 because they are us. We -- we endow them with a
10 certain sense of our own identity as individuals
11 participating in a continuum of family life, as
12 community members routing for a particular team, and
13 as Americans who love to do well and win in sports.

14 And I remember a comment by the theologian
15 Michael Nowak, who said that a town could lose its
16 symphony orchestra, its ballet, its library, even its
17 church, and not suffer the same kind of debilitating
18 loss of identity that a town has when they lose its
19 baseball team or its sports team.

20 That's a kind of crushing blow, and you
21 begin to sense that even though this seems outside the
22 important stuff of our lives, it is nonetheless
23 wrapped up intricately with who we are and who we'd
24 like to think we are, and that's the biggest important
25 thing -- that sports offers this repository of hope,

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1 of memory, and of future possibilities all at once,
2 and at the same time can be just seen as the simple
3 box score, who won, who lost, who is good, who is not.

4 Q Does it make any difference to you that
5 sports on distant signal is live and it's first run?

6 A Well, this is -- this is one of the most
7 important things. Part of our television landscape
8 that we all acknowledge is clutter. I mean, we are
9 bombarded with so many things that are so formulaic.
10 What is wonderful is that sports are form
11 transcending. They go beyond it. That is, you cannot
12 predict the regular commercials. Anything can happen.
13 And in many cases, in baseball, you could have a
14 three-hour inning. It could go on that long.

15 It is live. It is happening right now.
16 It is not disposable, but it is immediate. And all of
17 these sorts of things begin to tug at us. And
18 particularly in such a large and diverse nation that
19 can no longer see games, television is where we get
20 it.

21 Q Now, distant signal sports broadcasts
22 provide access to sports to viewers who might not
23 otherwise have that access, is that correct?

24 A That's correct.

25 Q So that a fan of the Braves team who

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1 happens to live in Tulsa, Oklahoma, or another city
2 that may get Braves telecasts, would be able to view
3 a live sports telecast without having to fly to
4 Atlanta and pay the price of a ticket. Is there any
5 value to that, to having access at a great distance?

6 A Oh, absolutely. The story of baseball,
7 and the story of other sports, is expanding the
8 audience besides those who participate in it. You
9 read a box score. You've expanded your audience. You
10 read just the description in the newspaper. You've
11 expanded your audience. You listen on radio the way
12 many women and children became fans. You saw the game
13 of the week on television, and now we have this
14 possibility to really cut across a great deal of -- of
15 time and distance with these new superstations and how
16 they bring sports to us.

17 The important thing here is that we suffer
18 today, it seems to me, with what the historian Arthur
19 Schlesinger said was too much pluribus and not enough
20 unum. There are really few things in our environment
21 that remind us why we agree to cohere as Americans.
22 We are so fractured and fragmented, and sports is the
23 glue that holds us together in one way. There are
24 very few entities that actually provide that service,
25 that can be that kind of glue to connect us.

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1 And what is nice is that we can be
2 connected in ways we never have before by these
3 distant signals, by this -- the superstations that
4 bring us not just the physical games but what they
5 mean to us -- the characters, the heros, the dramas,
6 all of the things that I think begin to form the kind
7 of identifications that I spoke of earlier.

8 Q In your baseball documentary, I know
9 Mr. Boswell indicated that having access to the game
10 of baseball, even if you actually don't watch it, it
11 can provide some value. Can you explain a little bit
12 about what he meant by that and whether you agree with
13 that?

14 A I agree completely. I know exactly what
15 he meant. There is something really comforting about
16 baseball. You know, what it -- it's like the light
17 left on at home. You know, it's there. There are
18 many things that we take security from in our lives,
19 that we are pleased are there. It may be for some
20 people the revolver under the pillow or in the drawer
21 that you hope you never use, or the policeman who
22 never has to discharge his revolver, or the defense
23 that you never have to engage. But -- but it's there.

24 And I feel in some ways that having the
25 possibility of sport is one of the great pleasures.

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1 I speak for myself as a fan but also as a student of
2 the country and of the game, that that is really true,
3 it's the light left on at home, the way that no other
4 sort of things are in --

5 Q Did you find that to be generally true in
6 the people you talked to in your documentary?

7 A I -- I can't begin to tell you how many
8 people I've been stopped by just today who recognized
9 me and said, "You know, I really loved the baseball
10 thing," and wanted to stop and talk as if baseball was
11 a lamp unto which we could come together, perfect
12 strangers, and talk about so and so.

13 I was at breakfast this morning and having
14 a conversation in which my love of the Red Sox came
15 up, and the guy at the next table said, "Oh, I suffer,
16 too," and all of a sudden the conversation and the
17 dialogue was passed on. That's the beauty of it.

18 Q Now, when we talk about a cable
19 subscriber, we talk about somebody who actually
20 purchases a package of channels, and distant signal
21 networks including something like WTBS that carries
22 baseball or other sports are just one part of a
23 package. Can you tell me what value of having access
24 to, say, a superstation or to a distant signal that
25 provides sports would do to one's appreciation of the

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1 value of that package as a whole?

2 A Well, I think we perceive that in the
3 range of options that we get from a cable company,
4 that there are those we would consider premium, not
5 just in the sense that they might be charged for, but
6 premium in that they are the most attractive features
7 of it. And I know for my personally, and I know from
8 just studying this thing, that a sports station, the
9 ability to get in a sports game is -- is of critical
10 importance. I mean, that's -- it seems to me, it goes
11 without saying, it's the first thing that I ask.

12 I live in a small rural town in New
13 Hampshire, 500,000 people in this little village, and
14 we've had a cable company there that keeps changing
15 and keep -- but the thing that you get when you
16 subscribe, that you want to get if you're in New
17 England, is the Red Sox baseball games that come from
18 WSBK.

19 Q All right. And how would you compare, for
20 example -- at least from your own perspective, every
21 cable viewer might be different -- but the benefit of
22 having access to a baseball game versus an additional
23 hour of reruns of I Love Lucy?

24 A Well, this gets into some subjective
25 things, but I believe that we're bombarded. We

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1 basically have an environment of static, and I think
2 that most of our television is kind of static. I
3 mean, even the statistics are that people leave it on,
4 and it's just there.

5 I think that sports are something
6 different. I'd like to say that rather than being the
7 background static that they are really the background
8 music of our country, that you don't just leave it on.
9 It requires something more than the passive image of
10 a couch potato. When you're watching a game, I think
11 you're more actively involved.

12 And that's where I think the value comes
13 in, but it's -- but I don't think you buy your cable
14 station to get a syndicated rerun of, you know, I
15 Dream of Jeannie. You don't buy into your cable thing
16 to find out the Wheel of Fortune, though you might be
17 a passionate, you know, addict to that. I think you
18 get it because it's going to provide a range of
19 services that might wake you up.

20 And my suggestion is that in an
21 environment that is essentially somnambulistic, sports
22 wakes you up just a little bit, and that's a
23 significant thing, and you really can't gainsay that
24 -- the importance of that in our environment. Too
25 many things put us to sleep.

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1 Q So is that what you meant in your written
2 testimony when you said that much of television
3 programming today is interchangeable?

4 A I think it is. In some ways, we have been
5 betrayed by television. You know, we were told at its
6 unveiling and conception and -- of a certain kind of
7 democracy that we would see, and I think what we are
8 seeing is kind of the clone-like replication of
9 everything looking the same on -- on the stations, and
10 the -- you know, the number of commercials, and all of
11 these things are a deadening influence.

12 I mean, I have cable not to participate in
13 that but to try to get away from it, to try to search
14 out the few places where you -- might be an oasis from
15 that, and I think that sports programming for me,
16 particularly baseball, is -- is a happy home.

17 Q So you would actually be a supporter of
18 distant signal programming, insofar as what it can do
19 is present programming that brings together Americans
20 and sort of gets them to unite around common purposes,
21 goals, one of them being the sports competition?

22 A Absolutely. I think you said that very
23 well. It is an opportunity to have a conversation
24 with other people. You can -- it isn't just that the
25 next morning at the water cooler you can say, "Hey,

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1 did you see that catch by Dave Justice?" It goes well
2 beyond that, because this occurs in time. It's just
3 not the specific conversation that we might want in
4 these proceedings to quantify and to figure out
5 precisely, but over time these accrue.

6 I remember at the -- when I was working on
7 the series on baseball, I interviewed a noted
8 historian, Doris Kearns Goodwin, and she has written
9 on the Kennedys and Lyndon Johnson, and more -- most
10 recently on Eleanor Roosevelt and Franklin Roosevelt's
11 relationship in the White House. And she is a
12 passionate baseball fan, and she said -- she described
13 a lot about her father who had died before her
14 children were born.

15 And she says that she is at the ballpark
16 and that for her seeing her kids at the ballpark, her
17 recreating the earlier experience she had had with her
18 father, made her think that this is a way that her
19 kids could know her father. That's a powerful thing.
20 You don't get that just anywhere.

21 And I think there is a sense of well, it's
22 just sports. It's athletic. You sweat. You have a
23 kind of abstract excellence, quite apart from the
24 stuff of our lives. I disagree. If a woman can sit
25 there with her children and imagine that her

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1 grandchildren -- that the grandchildren of her father
2 are connected to him, that can know him through a
3 simple game, by sitting in the stands and having a
4 beer and a hot dog, that's a terrific thing that we
5 ought to know about.

6 Q All right. Now, in this proceeding, we're
7 focusing on the years 1990 to 1992. I don't know if
8 you can think back a few years and remember what was
9 going on in baseball at that time. Are you aware of
10 anything particular about those years in relation to
11 baseball where distant signal sports might have had
12 some unique value?

13 A Well, the obvious one, besides the fact
14 that my Red Sox weren't anywhere near in contention,
15 which is a source of great pain, was the --

16 Q Did you watch them?

17 A Oh, of course. And I -- and I get to see
18 by these distant signal stations a half to two-thirds
19 of the games. I mean, I -- I really -- otherwise,
20 they wouldn't be there. Might be radio, but having
21 that there is a -- is a regular voice in my house.

22 But, yes, this was the ascendancy of
23 Atlanta Braves, to take one sort of example, where it
24 was possible to see the best baseball being played
25 almost every night on TBS through that stuff, and to

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1 learn names that are not just the names of the Atlanta
2 region or that what you'd learn as a kid passionately
3 involved with the game, but the household word, the
4 Lempke injustice, and Gant, and McGriff, and people
5 like that. This was a terrifically important period
6 in the life of the Atlanta Braves, and it was to our
7 benefit that they were there for all of us to watch.

8 Q So even when the Red Sox aren't doing
9 well, you'll watch the Braves -- sports?

10 A The funny thing about sports is if you --
11 if you're really on to it, it's not -- it is not, as
12 they say in the cliché, about winning or losing, but
13 about the exquisite pleasure that even losing can
14 bring. There is a kind of pain to being a Red Sox fan
15 that almost everyone would agree with, but it -- it --
16 there are some life lessons, some complicated life
17 lessons that are -- that are tied up in this. And
18 whether you win or whether you lose, whether it's your
19 team or somebody else, there is a lot there.

20 It's an iceberg, you know, with, you know,
21 so much submerged that it's hard to really apprehend
22 finally. This is what I came up with -- five years of
23 studying baseball. I was surprised. I had planned
24 five one-hours, instantly expanded it to nine one-
25 hours, and ended up with an 18-1/2 hour series.

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1 Q All right. Well, thank you. Those are
2 all the questions I have. I think some other people
3 would like to ask you some questions.

4 CROSS EXAMINATION

5 BY MR. HESTER:

6 Q Hello, Mr. Burns.

7 A Good afternoon..

8 ARBITRATOR WERTHEIM: Going to be a
9 hostile --

10 (Laughter.)

11 MR. HESTER: Well, I didn't think, from
12 one suffering Red Sox fan to another, that we could
13 start off by asking Mr. Burns about Bucky Dent --

14 (Laughter.)

15 -- Bill Buckner --

16 THE WITNESS: They're naming the tunnel
17 that will connect Boston, the Harbor Tunnel, after
18 Teddy Williams. It's being opened next -- this week.

19 ARBITRATOR WERTHEIM: Long and thin.

20 BY MR. HESTER:

21 Q Mr. Burns, my name is Timothy Hester. I
22 represent the Public Television Claimants in this
23 proceeding.

24 Let me ask you, if you could, to describe
25 a bit more of your Civil War series that you refer to

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1 in your testimony here.

2 A Between 1984 and 1990, I produced and
3 directed and co-wrote a history of the Civil War that
4 was 11-1/2 hours long, which was broadcast in the fall
5 of 1990 on public television. It was a watershed for
6 my career, and I think in some ways a watershed for
7 public television. It ended up being the highest
8 rated program in the history of the thing, and I think
9 brought the power of that moment to a public that was
10 hungry for knowledge of their past, and the Civil War
11 was its sort of traumatic event in its childhood.

12 Q What, in your view, made it a watershed
13 for public television?

14 A It's hard to say. I think most of it had
15 to do with the fact that because the Civil War
16 lingered in us, whether articulated by those who were
17 familiar with it or unarticulated by those who tended
18 to ignore it, it was nonetheless the traumatic event
19 in the childhood of the nation. My mother died when
20 I was 11, and there is not a day and a moment when I'm
21 not aware of the influence -- good, bad, and otherwise
22 -- of that, as you can imagine, tragic event on my
23 life.

24 And so, too, the Civil War works on us.
25 So anybody who is going to be out there and -- and

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1 putting up for view something about it, I think people
2 would respond. That's the great gift of history.

3 Q And would you agree that this was a
4 watershed event for public television in the sense
5 that the Civil War was so widely viewed and widely
6 acclaimed that it garnered special attention for
7 public television?

8 A Yes, it did.

9 Q And could you expand on that, please?

10 A Well, I -- I think that they had audiences
11 that were larger than were expected, and the series
12 won a number of awards, and there was a kind of
13 passionate public response to the series that
14 continued long after the last episode was aired, in
15 the form of letters and sort of national conversation
16 that I think it helped to spawn in the very best sense
17 of that word.

18 Q Now, both the Civil War series and the
19 baseball series were shown on public television, is
20 that right?

21 A That's correct.

22 Q Is there anything special about public
23 television that facilitated the development of these
24 programs?

25 A Well, there is a number of things that

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1 distinguish public television that I think are
2 commendable, including freedom from advertising. But
3 I think most of it has to do with the very real
4 exigency that I have as an independent producer of the
5 source of funding. I am required to seek out funding
6 from corporate underwriters, private foundations, but
7 most important government and quasi-governmental
8 agencies who require, as a matter of course, that if
9 any award is given that the program be offered free of
10 charge to public television.

11 Q And in the case of the Civil War, how long
12 did you work on that series?

13 A Five and a half years.

14 Q And did that require extensive research on
15 your part?

16 A Yes, it did.

17 Q And was that something that you would have
18 been able to develop on behalf of commercial
19 television, in your view?

20 A It's hard to say. There have been some
21 extraordinarily well produced documentaries. In fact,
22 when one thinks documentaries, one often thinks of the
23 legacy of exquisite ones produced by CBS. I have had
24 offers from many of those same people to work with
25 them. But I enjoyed my relationship with public

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1 television, and I don't think I would have been able
2 to fund it entirely through a commercial network, in
3 that the National Endowment required me to go through
4 public television.

5 Q Now, you mentioned before the significance
6 of the lack of advertising on public television. How
7 does that affect the type of programming that you are
8 able to develop?

9 A Well, in the same way that I was speaking
10 earlier about our attention and the static, I think we
11 are a country that -- that has lost its ability to
12 engage its attention fully. We are interrupted, for
13 the most part, every six to eight minutes on
14 commercial, on networks and cable stations, to be sold
15 stuff.

16 And so we've trained two or three
17 generations of individuals who have a hard time
18 focusing, and I would wager that every person in this
19 room, the thing that they value most are the things
20 that occur in duration, those relationships that they
21 have, the work that they have worked so hard on is the
22 most satisfying aspect of their lives. These occur in
23 duration. All real meaning accrues in duration.

24 And one of the advantages of a non-
25 commercial venue is -- such as public television is

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1 that you are free to develop your attention. That's
2 what -- that's essentially the principal advantage, as
3 I see it.

4 Q And what would the effect have been on
5 your Civil War documentary, for instance, if there had
6 been ongoing commercial interruptions?

7 A I couldn't say. My film is continually
8 pledged on public television, which to many minds is
9 an even more sublime torture than -- than regular
10 commercials, and it doesn't seem to suffer too badly.
11 I do tend to edit in an episodic fashion. That is to
12 say, every six, seven, or eight minutes, I, in fact,
13 fade out and introduce a new chapter, and those who
14 have interrupted it have found that pretty easy to do.

15 Q Now, the Civil War series was shown during
16 1990, is that right?

17 A Yes, September 23rd I think it started,
18 1990.

19 Q Let me hand you a copy of some clippings
20 on that series.

21 MR. HESTER: Your Honor, this is also a
22 document that is included as Public Television
23 Exhibit 15 in our direct case, but it is being
24 sponsored by Jennifer Lawson. I don't propose to have
25 it marked as an exhibit at this time for sponsorship

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1 by Mr. Burns, but I thought for reference it would be
2 useful to have it here for the panel.

3 CHAIRPERSON JIGANTI: It should be marked
4 as an exhibit even though you don't wish to have it
5 offered.

6 MR. HESTER: Okay.

7 CHAIRPERSON JIGANTI: What number?

8 MR. HESTER: This would be PBS Exhibit
9 3-X.

10 (Whereupon, the above-referred
11 to document was marked as PBS
12 Exhibit No. 3-X for
13 identification.)

14 BY MR. HESTER:

15 Q Mr. Burns, I don't mean to make you read
16 all of the way through this. I'll point your
17 attention to particular passages. Do you recognize
18 the cover on this document, PBS Exhibit 3-X?

19 A I do.

20 Q And could you describe what that is,
21 please?

22 A This is the cover to the Newsweek magazine
23 that came out within a couple of weeks of the
24 broadcast.

25 Q And there is a reference on the cover to

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1 a "stunning TV series sparks old passions and new
2 controversies." Do you see that?

3 A Yes.

4 Q And is that a reference to the Civil War?

5 A Yes, to my series.

6 Q To your series. Let me ask you to turn,
7 please, about midway through the document. There is
8 a review from The New York Times dated September 23,
9 1990, with the heading, "Our War: The Way it Was."

10 A Yes.

11 Q Do you see that? Do you recognize this as
12 an article written by Walter Goodman?

13 A Yes.

14 Q And it was a review of your series?

15 A Yes.

16 Q Let me ask you to look specifically at the
17 second paragraph of text, and if you could read that
18 into the record, please, the second paragraph.

19 A That begins, "The 11-hour series"?

20 Q Yes.

21 A "The 11-hour series which begins the PBS
22 prime-time season tonight at 8:00, and continues
23 through Thursday, is so rich in conception and so
24 rewarding in execution that it almost redeems the
25 promise of the median. Mr. Burns and his associates

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1 have translated the materials of history into
2 television drama of an epic order."

3 Q Could you comment on that, Mr. Burns?

4 (Laughter.)

5 A I have on the door to my refrigerator a
6 New Yorker cartoon which shows two men standing in
7 hell, flames licking up around them, and the first guy
8 turns to the second and says, "Apparently, my over 200
9 screen credits didn't mean a damn thing."

10 (Laughter.)

11 So I am loath to add whatever spin you
12 want me to add on that.

13 Q Well, you speak in your testimony about
14 interchangeable programming. This is something that
15 Ms. Behan asked you about previously. Do you recall
16 that?

17 A Yes.

18 Q Could you distinguish the series from what
19 you're referring to as interchangeable programming in
20 your testimony? What's the difference?

21 A Well, I think setting aside the hyperbolic
22 commentary of a country that tends to digest something
23 and move on to a new flavor all the time, I think what
24 Mr. Goodman is getting at in this review, and what I
25 hope we are able to achieve in the Civil War, is to

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1 offer more of a sense of the promise of television.

2 That is to say, as a filmmaker, as a
3 television producer, I was hoping to extend to the
4 audience a kind of intelligence that I felt
5 traditional programming did not offer. And that
6 because we were able to combine that with a compelling
7 subject such as the Civil War, there was a kind of
8 synergy, a kind of alchemy that occurred to I hope
9 everyone's benefit.

10 Q Is this a type of programming that is
11 truly different in kind from that typically found on
12 commercial television today?

13 A To some extent. Well, not today. I think
14 you see a great deal of Civil War imitators and also
15 incredibly great programming of its own right. But to
16 be honest, this style of filmmaking that I had
17 employed for the Civil War was one I had been using
18 for 10 years and was out there. So I think -- I think
19 it's there. I don't think you can over -- you should
20 overstate the success of the series. I think it's --
21 it's a good film, and I'm very proud of it.

22 Q Well, but I'm really thinking in the
23 context of this proceeding where we can front a
24 question of the value and benefits to cable operators
25 of different kinds of programming. And you understand

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1 that's the generalized issue presented here.

2 A I do understand that.

3 Q And in that context, one of the questions
4 presented is the value of public television
5 programming to cable operators as contrasted with
6 other kinds of programming that they may have imported
7 on a distant signal. Do you understand that as well?

8 A Yes, I do.

9 Q And in that context, would there be
10 particular benefits to a cable operator that was able
11 to import on a distant signal a program such as this
12 in contrast to the kinds of movies and syndicated
13 programming that you had discussed in your prior
14 testimony?

15 A I would be loath to make as blanket a
16 generalization as that, and particularly when you
17 include the word "movies." But, you know, I think
18 it's a good program, and it -- and I made it so I
19 would -- I would recommend it to everyone,
20 particularly if they wanted to go out and buy it.
21 That would help me put my kids through college, so --

22 (Laughter.)

23 -- that is certainly what I feel. I think
24 there is value to public television, which is what I
25 think you're getting at.

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1 Q And what is that value, Mr. Burns?

2 A I think it is essentially a place where
3 many of the issues in programs that the commercials
4 networks don't have the inclination to handle get
5 handled, complicated science, complicated history,
6 programs get made. And that's to our benefit.

7 Q And is there a diversity to a cable
8 operator's menu of program offerings that flow from
9 that sort of diversity in public television
10 programming?

11 A Well, I think in the range of what a cable
12 operator is offering, public television is obviously
13 a strong -- strong player, without a doubt. I mean,
14 I -- as far as I understand, the broadcast reach of
15 public television is near total in the United States.
16 That is to say that I believe nearly every home can
17 get a broadcast signal of public television, which I
18 think makes the distant signal things -- not moot, but
19 it makes it less critical, at least to the discussions
20 of -- of today.

21 Q Well, are you aware that there are a
22 number of cable operators that get their first public
23 television signal as a distant signal?

24 A Yes, I do understand that.

25 Q And I would like you to consider that sort

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1 of cable system -- a cable system that does not have
2 access to a public television signal on a local basis
3 -- and for that sort of cable system, what would be
4 the advantages of being able to import a distant
5 public television signal, which would include the
6 Civil War --

7 A Yes, I think it --

8 Q -- and many other things.

9 A It's the access to the kind of quality
10 programming that we've been discussing.

11 Q And is there, in your view, benefits in
12 terms of the culture promoted by television that flow
13 from having that sort of diversity in programming
14 available to cable operators?

15 A Yes.

16 Q Now, do you have your written testimony in
17 front of you?

18 A Yes, I do.

19 Q If you could turn to page 5, and there is
20 a -- there is a discussion in the middle paragraph and
21 you refer to interchangeable programming. That's the
22 point we've discussed before.

23 A Yes.

24 Q And then there is a sentence at the
25 conclusion of that paragraph, "Only in those rare

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1 instances of national trauma or form-transcending
2 moments of pure sports does television, in my view,
3 confirm more than a potentially lethal light in our
4 living rooms and minds." Do you see that?

5 A Yes, I do.

6 Q Are you referring there to commercial
7 television?

8 A I am referring to a whole -- the whole
9 range of television, which for the most part I would
10 characterize, as Newton Minnow did, as a vast
11 wasteland.

12 Q And would you distinguish public
13 television programming from what you are describing
14 here?

15 A Some of it, yes.

16 Q And in what sense?

17 A In the sense of that rising above formula,
18 rising above predictability, always rising above
19 commercial interruption, like sports, like national
20 trauma, by which I meant things like the Kennedy
21 assassination, a Gulf War that would provide us a kind
22 of opportunity to -- to look at something together.

23 Q And would you agree that because public
24 television is not oriented toward advertising that
25 inherently it is seeking a diversity in its

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1 programming mix that is not typically found on
2 commercial television?

3 A That is correct.

4 Q Let me ask you to look back at PBS
5 Exhibit 3-X, toward the back end, the third page from
6 the back, there is a clipping from The Washington
7 Post.

8 A Yes.

9 Q And do you recognize this clipping,
10 Mr. Burns? Have you seen it before?

11 A I believe I have seen it before, yes.

12 Q And I wanted to direct your attention to
13 the right-hand column, the fourth full paragraph on
14 that page, and there is a sentence -- the second
15 paragraph of that -- I'm sorry, the second sentence of
16 that paragraph reads, "The Civil War proved again that
17 the public will respond to well-made and intelligent
18 television, especially if it speaks to what might be
19 called 'the American soul.'" Do you see that?

20 A Yes, I do.

21 Q And is that the point you are discussing
22 here in your written testimony as well, that the
23 public will respond to well-made, intelligent
24 television programming?

25 A Yes, I believe that's it. Abraham Lincoln

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1 spoke about the better angels of our nature, and very
2 few things in our environment attempt to call them up.
3 And I think that when you do something well that
4 people respond. You might be engaging what we might
5 call a better or higher part of ourselves.

6 Q And are there particular types of
7 programming on public television that you would put
8 into that category, aside from your work, particular
9 types of programming you would place in that category?

10 A Certainly.

11 Q What are some of those?

12 A I am impressed with public television's
13 journalistic programs. I am impressed with its
14 history programs, in general, and its science
15 programs. I think those are the three --

16 Q And I take it from something I've read
17 that you have some small children yourself?

18 A I do. I have two daughters.

19 Q And would you also agree that the kind of
20 children's programming, educational children's
21 programming, is very difficult to find on commercial
22 television, the type that is found on public
23 television?

24 A Yes, it is.

25 Q And is that also a benefit of public

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1 television programming that would be of real value to
2 a cable operator, that could --

3 A Yes, I would say so.

4 Q Let me turn back to your written testimony
5 again. Again, on page 5, the next paragraph begins,
6 "I strive, with more success on some occasions than
7 others, to approximate those form-transcending moments
8 in the programming that I labor for many years to
9 produce. When I succeed, I believe that I have truly
10 brought value into the American television viewing
11 home." Do you see that?

12 A Yes, I do.

13 Q What do you mean there by your reference,
14 "I have truly brought value"?

15 A Well, first of all, I -- I hope that that
16 is the case. And as I spoke earlier about sports,
17 there is a sense that something could be larger than
18 the sum of its parts. That one could spark, for
19 example, in the case of the Civil War, conversation,
20 further reading. I noticed that many scholars' books
21 on the Civil War that had not sold out and sold
22 very well afterwards. That is really heartening for
23 me, because it means that -- that you've expanded the
24 dialogue. You've expanded the possibilities of -- the
25 median, and I hope particularly the subject, in this

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1 case the Civil War.

2 Q And, again, I take it you would agree that
3 for a cable operator that did not have access to that
4 programming, if it did not have a local public
5 television signal, it would be missing out on
6 programming of real value if it could not import that
7 on a distant basis.

8 A That's true, it would be missing out.

9 Q When you refer in the testimony I just
10 read into the record to striving to approximate those
11 form-transcending moments, and you say that you strive
12 with more success on some occasions than others, what
13 occasions were you thinking of that you would identify
14 as being more successful than others?

15 A That's really kind of a personal
16 statement. It really has to do with myself as an
17 individual artist or craftsman, you know. And it
18 may not be a particular production, but moments within
19 it, where you feel -- there are times people have told
20 me in the Civil War where they felt that they were
21 there in the back, that the use of -- the way I moved
22 the camera made them -- and the sound effects and the
23 music and the drama of the situation made them feel
24 like they were there. That's sort of what you're
25 looking for, that moment when the apparent staticness

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1 of the images disappears.

2 And so I'm constantly searching for those
3 moments in my work, and to lesser or greater degrees
4 has to do less with particular productions and their
5 relative commercial success, or the size of their
6 audience, than it is with my satisfaction with it at
7 that moment.

8 Q Let me ask you again to look at
9 Exhibit 3-X. About four pages in there is an article
10 out of USA Today --

11 A Yes.

12 Q -- headed "Epic TV Film Tells Tragedy of
13 a Nation." Are you on that page?

14 A Yes.

15 Q And there is a quotation in the right-hand
16 column, about halfway down, that's attributed to
17 Jennifer Lawson. Do you see that quotation?

18 A Yes, I do. Mine is a little bit blurred.

19 Q Right. I apologize for that. Let me read
20 it to you and see if you can respond to it. "We think
21 viewers are asking for a clear alternative, and the
22 Civil War represents that. It's very dramatic
23 material, says PBS Executive Vice President, Jennifer
24 Lawson." Do you see that?

25 A Yes.

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1 Q And do you agree with the proposition that
2 viewers are asking for alternatives in their
3 programming, that this is something that television
4 viewers want, alternative kinds of programming?

5 A I'd question the verb "ask," because I'm
6 not sure of the extent to which with television, which
7 is so essentially passive, we ever, as viewers, ask
8 for anything. You know, sometimes a letter-writing
9 campaign forestalls the slaughter of a popular, well-
10 made show. Most of the time it doesn't.

11 I think when she uses the word "ask," she
12 may mean more "wish." "Ask" involves a kind of
13 activity that I'm not sure television viewers really
14 get into. What it's really about is a hunger. I
15 think that we are -- generally, our programming
16 environment speaks down to us, and that we need to
17 seek out those places that don't.

18 Q And would you agree that that is one of
19 the missions of public television, to set out to
20 address some of the things that aren't addressed in
21 the commercial marketplace?

22 A Yes.

23 Q And that that would be one of the benefits
24 to a cable operator that was able to bring in a public
25 television signal on a distant basis?

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1 A Would have the advantage of having that
2 programming, yes.

3 Q Thank you, Mr. Burns. Those are all the
4 questions I have.

5 CHAIRPERSON JIGANTI: Thank you,
6 Mr. Hester.

7 Mr. Lane?

8 CROSS EXAMINATION

9 BY MR. LANE:

10 Q For the record, I'm Dennis Lane on behalf
11 of Program Suppliers.

12 Mr. Burns, on page 2, you indicate the
13 type of people that you interviewed for the baseball
14 documentary. Those are, as indicated, people that
15 study or associated with baseball?

16 A Yes.

17 Q Those are people that have, are they not,
18 a certain perspective on the game that may not be
19 shared by the average fan?

20 A May not be articulated by the average fan,
21 but, yes, I assume they could be opinions not shared
22 by an average fan.

23 Q And the documentary that you did -- you
24 referred to it a couple of times this morning -- or
25 this afternoon and in your testimony is the story of

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1 baseball, is that an accurate --

2 A It is called Baseball, simply that, and it
3 is essentially a history of the game.

4 Q Right. But looking on the third full
5 paragraph on page 2, you refer to the story of
6 baseball, correct?

7 A That's correct.

8 Q And by that you mean the history of
9 baseball.

10 A Yes. The word "history" is mostly made up
11 of the word "story."

12 Q And when you're talking about the various
13 aspects, you refer to it being a startlingly revealing
14 mirror of our country. Do you mean the story over
15 time, is that what you're referring to?

16 A I actually think that -- well, let me back
17 up. William Faulkner said, "History is not was but
18 is." There is a sense that you can't change the past,
19 but you can really, through an investigation of
20 history, learn about how you are now. So that in my
21 particular brand of history, to me baseball seemed a
22 way to reflect the tendencies of an American culture
23 that I found most interesting.

24 For example, I had worked for many years
25 on the history of the Civil War, which I have said was

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1 the traumatic event, the most important event in the
2 history of the country. The first real progress in
3 civil rights after that was when Jackie Robinson
4 walked on to a ball field in the spring of 1947. And
5 this moment didn't occur at a lunch counter in
6 Virginia, it didn't occur in a city bus in Montgomery,
7 Alabama, it didn't happen in a school in Topeka,
8 Kansas, or South Carolina, the popularly assumed
9 beginnings of our civil rights movement, but actually
10 happened on the diamonds of our national -- so-called
11 national pastime.

12 And it seemed to me a very significant and
13 important moment to recall, and so it seemed that
14 baseball was a mirror in many, many areas -- race I
15 think being one of the central dividing aspects of our
16 nation. That one could study baseball and learn not
17 just about Jackie Robinson, or the heroics of Hank
18 Aaron against formidable racist assault, but back into
19 the Negro Leagues and the untold history.

20 Q Now, just put the other side of the coin
21 out here. I'd like to introduce as Program Suppliers
22 Exhibit 29-X an article by Jonathan Yardley, who is a
23 writer at The Washington Post.

24 (Whereupon, the above-referred

25 to document was marked as PS

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Exhibit No. 29-X for
identification.)

Have you seen this article before,
Mr. Burns?

A Yeah. I got through it once.

(Witness laughs.)

Q You have to take the good with the bad in
your job, right?

A I think that's a fundamental requirement
of life on this planet.

Q Now, could you turn to the second page,
which in the top right-hand corner is marked
page 19 --

A Yes.

Q -- 22. And in the third paragraph in that
article -- or on that page, Mr. Yardley indicates that
you -- I'm going to paraphrase slightly -- your
business, meaning Mr. Burns's business, real business
is the manipulation of images and emotion, which is to
say the business of television. Do you see that?

A Yes, I do.

Q And was that part of your effort in
putting together any of your documentaries by, let's
just -- if we can focus on baseball, to put it
together in a way that was attractive to people that

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1 entertain them?

2 A Well, in the same way that a lawyer might
3 present a brief or question a witness.

4 Q An article that was bad for the witness?

5 A We -- we would certainly say that we
6 manipulate and work with emotions and images.

7 Q And to do that, you have to have a certain
8 perspective or a certain theme that would go through
9 your entire documentary, would you not?

10 A No, not necessarily. One might have to
11 have a consistent stylistic attitude or approach which
12 is what would result in its success. But, in fact, a
13 film could contain a multitude of perspectives, which
14 Mr. Yardley, not having seen the film and three months
15 in advance of its broadcast, could not have possibly
16 known.

17 Q Well, he -- I'll leave Mr. Yardley and you
18 to your own devices.

19 A It's a slippery slope with Mr. Yardley.

20 Q Maybe some day we'll be graced by his
21 presence and we can go down that slope.

22 One of the things you talked about on
23 page 3 of your testimony, right at the bottom of the
24 page, is churning up stories of baseball. Do you see
25 that?

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1 A Yes.

2 Q And those are stories about baseball,
3 right?

4 A Specific games. They -- the sort of thing
5 -- churning up --

6 Q Tell me what they are.

7 A They are --

8 Q What did you mean by "churning up stories
9 of baseball"?

10 A Perhaps the verb is ill-chosen or I guess
11 it's a gerund here, I don't know. That we were
12 investigating the stories, and these could be stories
13 about the facts of a specific game, as I said, the box
14 score, who won, who lost, who hit, who did what. It
15 might be an anecdote about a player. It might be
16 hearsay conversation -- that is to say, an anecdote.
17 It might be testimony in a trial. The infamous Black
18 Sox scandal. These are the things you collect in the
19 course of a production of the kind of I've been
20 describing. Literally thousands of stories.

21 Q And is that also, churning up a story,
22 something that would be done in the movies, for
23 example?

24 A No, you would invent a story in the
25 movies, if I understand you correctly to mean dramatic

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1 motion pictures.

2 Q And would that also touch upon powerful
3 sociological issues, could you do that in the movies?

4 A You could.

5 Q And, for example, could you do that with
6 movies about baseball?

7 A Yeah. I suppose you could, though you'd
8 be less -- you would have a vehicle that was less
9 suited to the promotion of those. An example outside
10 of baseball would be the movie Mississippi Burning,
11 which to anyone who is a student of civil rights is a
12 travesty of history, though a very compelling and
13 emotional and manipulative movie. It left things out.

14 Q Well, I was thinking of the role of woman,
15 for example, with A League of Their Own.

16 A Yes.

17 Q Would that be a movie that touched upon
18 sociological issues about the role of women through --

19 A Tangentially. Tangentially, yes, I think
20 it -- it did. I don't think it was its primary
21 purpose.

22 Q I don't know if your daughters are old
23 enough. Did you take them to see that movie?

24 A Yeah.

25 Q And I take it they were probably like our

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1 daughters, that led to a lot of discussion about women
2 in athletes -- in athletics.

3 A It did not happen in our case. My
4 daughters are very active in athletics. My oldest
5 daughter Sarah, I remember, when we left that film
6 said, "Too many endings." She is 13, but she must
7 have seen it when she was 10 or 11. But that --
8 that's the discussion I remember.

9 Q But it could lead to discussions about the
10 implications of the role of women in athletics.

11 A I would certainly hope that a film like
12 that, as popular as that, would engender
13 conversations.

14 Q And would The Natural be another movie
15 that might develop on the theme of the nature of
16 heroes and mythology?

17 A One could extrapolate that from the film
18 The Natural. I think it's harder than one could in
19 the book by the same name by Bernard Malamud.

20 Q But, like your experience, probably we
21 would see that the sales of The Natural, the book,
22 went up after the movie came out. That wouldn't be
23 unusual, would it?

24 A No. Usually a movie tie-in, as you know,
25 is quite successful.

1 Q And do you think that the type of texture
2 and intensity and powerful emotions that baseball
3 generates on a personal level, very personal level as
4 you state here, is something that people are thinking
5 about when they're watching the games?

6 A It depends. Certainly, yes, you can
7 answer that, but not -- it's not categorical. Of
8 course, you can go to a boring game.

9 Q But not if the Red Sox are playing?

10 A For me, not if the Red Sox are playing.
11 It's never boring.

12 Q One thing that you -- one thing that I --
13 was a little bit confusing to me, or maybe not
14 confusing, is some of the things that you talked about
15 were actually about playing the game, were they not,
16 when you talked about your daughters playing and --
17 I'm trying to find it as I'm talking to you. It's on
18 page 3 of your testimony, that baseball is played and
19 watched everywhere.

20 A Yes.

21 Q And in that aspect, you're not talking
22 about watching it on television, are you? You are
23 talking about people actually going out and playing
24 it.

25 A I was meaning the whole general viewing of

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1 baseball, so it would include television. It would
2 include playing it. It would include watching it, as
3 I do in Walpole, New Hampshire, with the Walpole Reds
4 and the Greens, the softball team that my girls
5 participate on.

6 Q Right. But as you say in your testimony,
7 or as you actually don't say, but baseball on
8 television is just reserved for millionaire
9 professionals, isn't it? They're the only ones who
10 play that we can watch on television?

11 A For the most part, that's true.

12 Q Right.

13 A It's not completely true. There are --

14 Q A few players who are not millionaires
15 yet.

16 A Right. There are a couple of players who
17 are not millionaires, but we do see little league on
18 television. We do see the college world series, and
19 we do see some minor league games, with increasing
20 frequency.

21 Q But the Atlanta Braves on TBS is --

22 A They are mostly millionaires, yes.

23 Q So part of what you're talking about is
24 just playing the game, or your daughters playing the
25 game?

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1 A Well, there is a kind -- there is two
2 levels to baseball, and what makes it and other sports
3 particularly attractive is that we know how to do it,
4 and we enjoy it, and then we watch with respect these
5 professionals who do the best job of it.

6 My youngest daughter likes to paint. I
7 think she is terrific, and it adorns my refrigerator
8 wall. But we also like to come and go across the
9 street and look at Vermeer, and -- and it's nice to
10 get the Vermeers along with fingerpainting.

11 Q Now, in that same paragraph, you talk
12 about players of today being haunted by the ghosts of
13 all of those players in the past.

14 A Yeah.

15 Q What did you mean by that?

16 A Yeah. I think particularly with baseball,
17 but it includes other sports, there is a wonderful
18 thing that happens, this notion of this generational
19 connection is not just attending to fans but attending
20 to players as well. That is to say, as you stand up
21 to the plate, you are in the presence of all of the
22 others who have gone before you.

23 And there is a rich legacy, a tradition,
24 just as a president, as he assumes office, has to be
25 haunted necessarily by the ghosts of all who have gone

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1 before him.

2 There is a sense that there are a few
3 things in our environment that can remind us of that
4 kind of continuum, whether it's an American political
5 continuum, or an American continuum of a community, or
6 a personal one. Baseball, other sports, are able to
7 offer that. That's a terrific thing.

8 MR. LANE: I'd like to introduce,
9 Mr. Chairman, at this time as Exhibit 30-X a copy of
10 an article by Tony Kornheiser, a writer for The
11 Washington Post.

12 (Whereupon, the above-referred
13 to document was marked as PS
14 Exhibit No. 30-X for
15 identification.)

16 THE WITNESS: You've found my ghosts.

17 (Laughter.)

18 MR. LANE: They're all coming back to
19 haunt you.

20 THE WITNESS: Oh, no. They're not too
21 scary.

22 MR. LANE: I don't think that
23 Mr. Kornheiser is very scary, do you?

24 THE WITNESS: No.

25 BY MR. LANE:

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1 Q Now, have you seen this article before?

2 A Yes, I have. It should be noted that I
3 had an opportunity to meet Mr. Kornheiser recently,
4 and he came up and he said, "You know, you've made me
5 a rich man," that he had essentially gotten so much
6 mileage off of this, he says, "You're a terrific
7 target."

8 Q I'd just like to refer to the -- I'm sure
9 there are a lot of wonderful quotes, and if there are
10 any there that you want to cite to me I'll be happy to
11 let you do that.

12 (Witness laughs.)

13 A I like the "get a haircut."

14 Q I'd just like to refer to the -- once
15 again, the penultimate paragraph on page 2.

16 A Yeah?

17 Q And where he asks you whether you're going
18 to show someone scratching and spitting.

19 A I'm sorry.

20 Q Do you see that?

21 A Penultimate paragraph on --

22 Q "Oh, Kenny, one more thing" --

23 A Yes.

24 Q Could you just read the second sentence in
25 that paragraph aloud into the record?

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1 A "Because I've been to a lot of baseball
2 games, and I have never had a sense that players sat
3 on the bench and mused about how baseball holds up a
4 mirror to America's soul." That sentence?

5 Q Yes, sir.

6 A Yeah.

7 Q And the paragraph right above that, could
8 you just read that paragraph into the record for us,
9 please, aloud?

10 A "Look, I like baseball, like all of the
11 other old white men in the show. It's the game of my
12 youth and the game of my father. But no matter how
13 many quotes from Walt Whitman you dredge up, because,
14 hey, who did Walt Whitman play for, I won't think it's
15 poetry, and I won't think it's religion, and I won't
16 think it explains the history of America, not any more
17 than the cotton gin, or the sunset off Monterey Bay,
18 or a Corvette on an open highway."

19 MR. LANE: Thank you. Those are all the
20 questions I have, Mr. Chairman.

21 CHAIRPERSON JIGANTI: Thank you, Mr. Lane.
22 Any other questions?

23 MS. BEHAN: Yes.

24 CHAIRPERSON JIGANTI: All right. Go
25 ahead.

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REDIRECT EXAMINATION

BY MS. BEHAN:

Q All right. Mr. Burns, I don't want to dwell too heavily on Mr. Yardley and Mr. Kornheiser. I do have a couple of additional questions to ask you.

Now, first of all, Mr. Yardley was only writing about the making of baseball, correct, a 30-minute summary, when he wrote this article?

A PBS had just broadcast, much to my embarrassment, a sort of "making of" that had been done. People had followed us around during the four years and an independent public television station in New Hampshire and put together a half-hour film of us, catching us on the sly if you will, making our film, and it -- from that and that entirely did Mr. Yardley extrapolate the series. It was not available.

Q Now, while you're quite scintillating, would you think that that was 30 minutes of form-transcending moments?

A No. There weren't actually, I don't think, any moments from the actual film. It was us making the film, so he refers to scenes and sequences that were actually changed before the film came out.

Q Okay. And if you look at that article, even he says in the article that television has turned

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1 image and reality into a hopeless muddle. Is that in
2 line with the views that you've just expressed about
3 most television programming?

4 A Very much so. I -- I agree with him in
5 that.

6 Q Okay. Now, Mr. Lane asked you some
7 questions about particular movies and how particular
8 movies, some of which related to baseball and the game
9 of baseball, might have provoked discussion. Do you
10 think that a rerun of The Jeffersons that was
11 broadcast over a distant signal would be likely to
12 provoke the kind of discussion that you might get from
13 a baseball game that's played live?

14 A I can't imagine that it would. It depends
15 on how compelling the themes might be presented in it.
16 I mean, it may tackle the -- an important theme, maybe
17 yes, maybe no. But generally, no.

18 Q Okay. Now, one of the issues in this case
19 and the fact that we're dealing with distant signal
20 programming, is that subscribers actually do get to
21 choose (quote) "a package" of programming. They may
22 not -- they may only be able to choose it by deciding
23 to subscribe or not to subscribe to that package.

24 But one of the elements in that package
25 might be a superstation with TBS, for a true sports

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1 fan or a true baseball fan in particular. Do you
2 think that a subscriber would actually be willing to
3 subscribe, that might make the margin of difference,
4 if they could get access to games that they could not
5 otherwise get access to on a distant signal?

6 A I have no doubt of that. I have no doubt
7 of that. I think it's a prime attraction, having that
8 distant -- you know, the sports available on those
9 distant signal stations as really a great sort of
10 attraction for a cable company.

11 Q Okay. So that distant signal sports
12 programming provides unique value to cable programming
13 as a whole in our country?

14 A Well, I hope I have been able to
15 articulate a sense of the value of sports, or the
16 value of baseball in particular, and those stations
17 that bring it are only helping. Yes, I think it's an
18 immeasurable value, in a way other programming is not,
19 I believe.

20 MS. BEHAN: Okay. Thank you.

21 CHAIRPERSON JIGANTI: Any other questions?

22 Yes?

23 RECROSS EXAMINATION

24 BY MS. AUSTIN:

25 Q Hi. I'm Jane Allison Austin for the

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1 Devotional Claimants.

2 Mr. Burns, would you say it would be fair
3 to characterize your testimony as saying that it's
4 peoples' passion to watch a particular kind of
5 programming that causes them to subscribe to cable
6 service?

7 A To some extent, yes, passion is involved
8 in that, yes.

9 MS. AUSTIN: Okay. Thank you.

10 CHAIRPERSON JIGANTI: Mr. Burns, just a
11 very few minor things. I'm trying to reconcile your
12 statement here. Apparently, you adopt the concept
13 that there is too much E pluribus and not enough unum.

14 THE WITNESS: Right.

15 CHAIRPERSON JIGANTI: And I'm looking to
16 your statement here. You say that television
17 substitutes a cultural monarchy vision of the
18 diversity of variety of democracy. Are those two
19 statements of view consistent?

20 THE WITNESS: Yeah, I think they are.
21 What I meant by too much pluribus and not enough unum
22 is actually paraphrasing the historian Arthur
23 Schlesinger who said that. It seems to me that there
24 are very little things in our environment that remind
25 us of what the essential genius of our system is,

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1 which has been to agree to agree and come together.
2 Small states and large states, back in 1789, agreed to
3 come together.

4 The television, when it came out,
5 suggested that this was -- might be the most
6 democratic of medias, that it would offer a variety
7 unprecedented. But I feel that there is a kind of
8 tyranny in many forms in television. There is a
9 tyranny of the commercial interruptions, the sense
10 that we are only economic beings and not spiritual
11 beings or intellectual beings of any kind. That there
12 is a tyranny of the sameness that we see on
13 television.

14 You know, if you're channel surfing, you
15 can sometimes see almost exactly the same sequence of
16 things at the same time. And there is a kind of
17 tyranny of celebrity and a cult of personality that
18 has developed. Indeed, the two columns that Mr. Lane
19 brought up are, in fact, a cynical media's attempt to
20 sort of adjust the balance of who is famous and who is
21 not, irrespective of the content of their programs.

22 These two gentlemen felt that because I
23 had enjoyed celebrity in one film I needed to be taken
24 down in another, part of a kind of tyranny of
25 celebrity and personality that I think does a

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1 disservice to our public, in that I'm looking for
2 those moments, either in the past, in the stories I
3 tell, or perhaps in the way one makes film, or an --
4 other than is in our television landscape that might
5 offer an alternative, that might offer a kind of
6 liberating democratic experience, if you will, and I
7 love that about baseball particularly.

8 I'm working on a history of jazz right
9 now, or the great genius of America, improvisation,
10 and compromise is adjudicated in a -- in an intensely
11 musical form.

12 CHAIRPERSON JIGANTI: That was really to
13 my second comment. It surprised me you identified
14 matters in public television over a special -- for a
15 person that was writing something on music, you didn't
16 mention any musical programs.

17 THE WITNESS: Well, it's funny. I -- I
18 realized when I had finished that I should have done
19 that. I'm so used to --

20 CHAIRPERSON JIGANTI: Wouldn't excuse the
21 three --

22 (Laughter.)

23 THE WITNESS: No, no, no. I do watch the
24 Live from Lincoln Center I assume you're referring to,
25 and the Met, and things like that.

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1 ARBITRATOR WERTHEIM: Do you watch GI-1?

2 THE WITNESS: Yes, sometimes.

3 ARBITRATOR WERTHEIM: I heard it for the
4 first time this morning.

5 CHAIRPERSON JIGANTI: I'll excuse you for
6 embarrassing me by not remembering the definition of
7 a gerund, but I won't excuse you for the fact that you
8 didn't mention Frank Thomas with your rendition of the
9 current stars of baseball.

10 (Laughter.)

11 THE WITNESS: It was a big hurt for you.

12 CHAIRPERSON JIGANTI: It was. It was a
13 big comeback.

14 Any other questions for Mr. Burns?

15 Thank you, Mr. Burns. You are excused.

16 THE WITNESS: It's my pleasure. Thank
17 you.

18 (Whereupon, the witness was excused.)

19 CHAIRPERSON JIGANTI: We'll take a five-
20 minute recess.

21 (Whereupon, the proceedings were off the
22 record from 2:16 p.m. until 2:36 p.m.)

23 CHAIRPERSON JIGANTI: Welcome back, Mr.
24 Gerbrandt. I'm sure you're delighted to be here
25 again.

1 THE WITNESS: In your presence, Your
2 Honor, always.

3 CHAIRPERSON JIGANTI: You may proceed, Mr.
4 Lane.

5 MR. LANE: Thank you.

6 CROSS EXAMINATION (continued)

7 BY MR. LANE:

8 Q Mr. Gerbrandt, could you turn to page 38
9 of your testimony, please? This is the same type of
10 ratio table that we discussed this morning with regard
11 to program expenses, is it not?

12 A That's essentially correct. Same type of
13 calculation.

14 Q On page 39, you have a very similar
15 sentence to the one that we discussed this morning
16 with regard to programming expenses, do you not; and
17 that is the sentence "ESPN had more than twice as much
18 value to cable operators as its share of viewing
19 within: --

20 A As measured by the amount cable operators
21 actually paid to carry ESPN.

22 Q Right. And that is -- what you've just
23 read is the only difference between the two sentences,
24 isn't it?

25 A No.

1 Q The other differences to cable operators
2 -- you're talking about the value to cable operators
3 here?

4 A That is what this is discussing, yes.

5 Q Right. And on page 25, you weren't
6 talking about value of the cable operators?

7 A That is correct. We were talking about
8 value to the cable networks.

9 Q The cable networks, okay.

10 A Of programming carried -- or in the case,
11 programming carried on ESPN.

12 Q Right. Now -- I'm sorry.

13 A There are significant differences between
14 the two, so --

15 Q Okay, what are those differences?

16 A ESPN's programming had more than twice as
17 much value as measured by the amount ESPN actually
18 paid to acquire and to produce that programming, as
19 ESPN's share of viewing would indicate. I think most
20 of that sentence is different, or we can do it -- a
21 word by word comparison, but I'm not sure that's --

22 One is talking about the value of
23 programming to ESPN. This is talking about the value
24 of ESPN as a network to the cable operators.

25 Q Now when I look at Table C-5 on page 38,

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1 I again see our old friend CNBC has a higher ratio, in
2 fact, in all three years here than ESPN, correct?

3 A That is correct.

4 Q Now does that mean that CNBC has more
5 value to cable operators than does ESPN?

6 A Relative to the viewing that it generates,
7 that is what that -- that is what that analysis is
8 intended to show.

9 Q Now when you say relative to the viewing,
10 how does that limit, if at all, your answer?

11 A Well, let's understand what this analysis
12 is intended to accomplish and what we set out to do
13 here. In a perfect world, you would always have --
14 life would be easy. There would be -- everything
15 would be priced the same, all programming would cost
16 exactly the same. All programming would generate
17 exactly the same amount of viewing.

18 Life would be very simple. You would --
19 everybody would get charged the same amount, whether
20 it was to buy programming on a per hour basis or to
21 generate it on a per hour basis, or to then license
22 that channel from cable network. In fact, life is not
23 perfect, and all programming is not created equal.

24 Some programming is much more expensive
25 than other programming. It's much more difficult to

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1 create, much more rare, much more unique. There's
2 also the free marketplace of negotiations that takes
3 place. At the same time, on the viewing side, not all
4 programming is equally attractive to the viewer.

5 Not all programming is equally of interest
6 to the cable operator. Therefore, there's another
7 dynamic that clearly takes place. If you take a look
8 at the cost of programming, if you take a look at the
9 fact that people watch different programming at
10 different levels in different rates, there's clearly
11 a different dynamic that is going on.

12 This analysis is an attempt to quantify
13 that dynamic. And I know it's a long explanation to
14 your answer, but ultimately that's -- it's an attempt
15 to quantify this value dynamic that is clearly present
16 in the marketplace.

17 Q Could you precisely define that value
18 dynamic about which you were just discussing?

19 A In the case of the networks, we valued --
20 we chose the ratio of programming cost to the viewing
21 it generates. As far as the operators are concerned,
22 we chose the ratio of affiliate fees to viewing as a
23 means of quantifying this dynamic in the marketplace.

24 Q So the dynamic is how much above or below
25 the viewing level, in this case, affiliate license

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1 fees shares are?

2 A Correct, in terms of relative to what the
3 programming costs the cable operator, relative to the
4 kind of viewing level it generates.

5 Q Now does -- is it fair to say that a 1.0,
6 that dynamic is in balance?

7 A Yeah, I would say that the -- I think
8 that's sort of by definition that there's a one to one
9 relationship between what it costs and what it
10 generates, at least as far as this group of 16
11 networks is concerned.

12 Q Right. You're just talking about your
13 table on page 38 for the moment?

14 A Yes, and I'm talking about this particular
15 group of 16 networks.

16 Q Right. Now, if it's below 1.0, does that
17 mean it's less -- of less value to the cable operator?

18 A Relative to the amount of viewing that it
19 generates, that is correct.

20 Q Okay, why don't we look at CNN and HN line
21 there. Do you see in 1990 the ratio was 1.0?

22 A Yes.

23 Q And in 1991, it was .7, correct?

24 A Correct.

25 Q Okay, does that mean that in 1991 CNN was

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1 of less value to cable operators -- is that how we're
2 supposed to read this table?

3 A Relative to the amount of viewing that is
4 generates.

5 Q Okay, so if it generated more viewing --
6 I don't understand the relative to the amount of
7 viewing it generates, how that affects the value.
8 Could you explain that?

9 A Well, it is -- in this case, it is less
10 expensive to the cable operator per the amount of
11 viewing that it generates.

12 Q So to coin a phrase that we may have seen
13 in one of our exhibit, you get more bang for the buck?

14 A In this -- in 1991, during the Desert
15 Storm as a -- partially as a result of Desert Storm
16 coverage, the cable operator got more bang for their
17 license fees from CNN and Headline News.

18 ARBITRATOR WERTHEIM: I thought it was
19 more buck for the bang in the exhibit.

20 THE WITNESS: Well, --

21 MR. LANE: It's both ways actually, Your
22 Honor. The title of it is The Biggest Bang For The
23 Buck. And then I think in the last paragraph which
24 was your earlier point, they do talk about getting the
25 biggest bucks for the bang.

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1 ARBITRATOR WERTHEIM: Okay, thank you.

2 BY MR. LANE:

3 Q But this is -- so what the .7 says here is
4 that for relatively low affiliate fee, they're getting
5 the same amount of viewing that they got in 1990?

6 A Correct, that occurred in '91.

7 Q For CNN?

8 A For CNN and Headline News combined.

9 Q Okay. Now do the affiliate fees represent
10 all the value to the cable operator of a cable
11 network?

12 A No.

13 Q What would be some of the other factors
14 that would be involved in value to the cable operator?

15 A Are we speaking of a basic cable network,
16 a --

17 Q We're speaking of the 16 listed on page 38
18 of your testimony.

19 A There are two areas that immediately come
20 to mind. One is that cable operators -- actually
21 there are three. One more came to mind, but I'll take
22 them in order. One is cable operators sell local ad
23 avails. So to the extent that they are in that --
24 because not every system does, but certainly the major
25 markets, they do that.

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1 And there is clearly value that is
2 generated by cable networks to the operator from local
3 ad sales. Number two, there are certain networks, and
4 I'm not sure that it would always necessarily be
5 these, but it can be -- there are networks around
6 which cable operators can create expanded basic tiers.

7 And to the extent that subscribers view
8 those networks as valuable, they're able to build
9 extra tiers or special tiers of programming around
10 them, and the net result is that they charge a higher
11 rate and generate higher revenue.

12 The third area, and this is a little more
13 of an intangible or a qualitative aspect, is there are
14 certain high profile networks that have established
15 brand names in the marketplace. I know we've talked
16 a lot about ESPN, but I have to tell you that from the
17 experience of being at one time a private cable
18 operator and having followed the industry, that a
19 brand name like ESPN sells cable subscriptions when a
20 cable operator goes into the marketplace and creates
21 a campaign.

22 A brand name like ESPN is one which
23 clearly has a marketing or a promotional value that
24 you might not immediately have with a weather channel.
25 So there is a concept involved in ESPN that they have

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1 worked very hard -- a brand name they worked very hard
2 to establish in the marketplace.

3 So those are three areas of value creation
4 that come into mind.

5 Q Why did you pick affiliate fees as a
6 measure of value for cable operators?

7 A Because it -- in terms of the relationship
8 between -- and if we go back to our chart here, that
9 is the direct relationship that exists between a cable
10 network and a cable operator. I mean, that is the
11 monetary exchange that takes place. No other --
12 really no other form of monetary or economic dialogue
13 exists between those two levels on the chart.

14 So it was an obvious or logical choice.

15 Q Now, are any affiliate fees paid for super
16 stations?

17 A Not in the way we have defined affiliate
18 fees. There is a common carrier fee that is paid to
19 a satellite carrier, but there's -- as we have -- I
20 think been pointed out several times, the super
21 stations do not receive affiliate fees from cable
22 operators.

23 Q And so, how would the affiliate fees
24 figure in in valuing programming on super stations?

25 A Again, understand what it was that we set

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1 out to do here. And that was to -- if I may go over
2 and stand in front of the chart, there is clearly a
3 relationship that exists between super stations and
4 program owners. There's one that exists between the
5 cable operators and the cable subscribers.

6 There is a disconnect here between the
7 super station and the cable operator. Our goal was to
8 create an economic market -- to do a market analysis
9 of a market that is analogous to one that would exist
10 if the chain were not broken. So analyzing this
11 chain, we looked at the relationship that exists here.
12 That's obviously very analogous.

13 And we looked at the parallel market that
14 would exist between here and here if the satellite
15 carrier were not in between. So we've -- that's
16 implicit in doing a market analysis and trying to --
17 I mean, that cuts right to the core, I believe, of
18 what we're trying to get to here, which is to
19 understand if there were an open marketplace, a free
20 marketplace, how would the super stations be valued.

21 Well, to do that, we look at the kind of
22 networks, and we do it later on in this analysis --
23 the kind of networks or kind of programming that
24 contains -- or the kind of networks that contain the
25 programming that super stations carry.

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1 Q So in a free market, the super stations
2 would just move over in the chart and move into the
3 place -- I don't mean into the place, but you know
4 what I mean -- next to cable networks?

5 A That is, I think, what we're trying to
6 understand or the dynamic we're trying to create here.

7 Q Now has Kagan valued the worth of cable
8 networks to operators in other circumstances?

9 A I recall that we've done various
10 theoretical studies that -- we tried to create once
11 what we called a channel allocation model. And it was
12 at a time when the industry was trying to figure out
13 what should it add next. The channel capacity was
14 very limited if you had one or two channels, or if you
15 wanted -- needed to drop a channel.

16 So we created a -- what we called -- I
17 think it was a channel evaluation model. It was --
18 generated quite a bit of controversy at the time, and
19 we took great pains to say look, this is a theoretical
20 analysis. We created a model cable system and tried
21 to use some bench marks. But please, don't use it as
22 a conclusion. Use it as what we offer this, as a
23 model that you should plug your own numbers in.

24 We just used our numbers as place holders.
25 So yes, we -- I recall that we did do a -- and

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1 possibly on more than one occasion, we visited that
2 analysis.

3 Q I'd like to enter -- introduce into
4 evidence as Program Suppliers Exhibit 31-X a copy of
5 two pages from the May 31, 1991 issue of Cable TV
6 Programming, and I would ask you, is this Cable TV
7 Programming the one to which your senior analyst, Mr.
8 Gerbrandt --

9 (Whereupon, the above-
10 referenced document was marked
11 as PS Exhibit 31-X for
12 identification.)

13 A I cannot identify this as such.

14 Q You can't identify it from down here?

15 A No, the masthead is marginally obscured on
16 this.

17 Q Okay. Do you see at the bottom of the
18 page it says Cable TV Programming is published by Paul
19 Kagan Associates, etc., etc.?

20 A Yes.

21 Q And is that something that you normally
22 put on Cable TV Programming?

23 A Yes.

24 MR. GARRETT: Excuse me, may I ask, Mr.
25 Chairman, is this the article?

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1 MR. LANE: Yes, it is.

2 BY MR. LANE:

3 Q And on the second page of Exhibit 31-X, is
4 that a cable evaluation model to which you were
5 earlier referring?

6 A This was one of the times it was run.

7 Q Is this one with which you had a personal
8 involvement?

9 A Yes.

10 Q Now, could we just turn to the first page,
11 please? Do you see in the middle of the page that it
12 indicates that there were three primary criteria taken
13 into account?

14 A Yes.

15 Q Okay. Could you read the paragraph aloud
16 into the record immediately under that?

17 A "Ratings weighed the heaviest in the
18 formula, as well they should because it is the viewers
19 who continually vote with their remote controls that
20 ultimately pay the license fees and determine how much
21 local ad revenue is generated."

22 Q Okay, and then if we turn to the second
23 page, is the column numbered three 1990, 24 hour
24 rating, is that the basis -- I'm sorry, is that the
25 component in this formula that relates to what you

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1 just read?

2 A Yes.

3 Q Now could you tell us what the second
4 criterion was?

5 A We have two studies speaking about the
6 second column or the --

7 Q No, no; I'm sorry. Just go back to the
8 first page and there were three primary criteria, and
9 I was just asking you what the second one was.

10 A License fees.

11 Q Okay. And where is that on the second
12 page? Is that in column 13?

13 A Yes, it is.

14 Q All right. And what was the third
15 criterion?

16 A Local ads -- contribution from local ad
17 sales.

18 Q Okay. And where is that shown on the
19 second page?

20 A That is shown in column 11.

21 Q Okay. Now in your earlier -- your answer
22 just before I introduced this exhibit, you were
23 talking about a factor -- is that what your
24 discussion, is that similar to what's referred to as
25 the step through factor on the first page of Exhibit

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1 31-X?

2 A I'm sorry, there is a step through factor.
3 I'm not sure what you're talking about in terms of --

4 Q You were talking about high profile cable
5 networks and their ability to, I guess, support an
6 expanded basic. Is that what the step through factor
7 is?

8 A Yes, and that is -- it partially relates
9 to that. We -- this was the very -- this was the
10 first time we had really addressed this issue and used
11 the same step through factor for each -- again,
12 remember, this is a theoretical model, and we
13 suggested cable operators put their own numbers into
14 these.

15 These are, as I said, place holder
16 numbers.

17 Q Right. And if we looked -- sorry.

18 A But the idea was that a cable operator
19 could choose one or a group of networks and say this
20 group of networks allows us to sell expanded basic and
21 they then would choose a number. We didn't want to be
22 put in the position of having to choose what the exact
23 factor should be.

24 Q And just so we can go through this, would
25 you look at column number four, please, on page two of

1 Exhibit 31. And you see the letters H-U-T or HUT?
2 Could you explain what that is?

3 A Yes, that is -- HUT stands for homes using
4 television.

5 Q Can you just expand on that a little bit?

6 A Sure. If you look at different groups of
7 viewers -- for instance, if you look at pay homes.
8 Pay homes tend to use more television. Non-cable
9 homes tend to use less television than the average.
10 And basic homes are in between pay and non-cable
11 homes. You can represent the level of viewership by
12 the amount of time that the television set is on in a
13 household.

14 You can do it by number of minutes per
15 week. In this case, we chose to represent it as a
16 percentage. What 31.7% means is that in the average
17 cable home, the television set is on 31.7% of the
18 time. There is a mathematical relationship between
19 ratings and shares. And the intervening number -- the
20 one that translates one into the other is the HUT.

21 Q That was going to be my next question.
22 Could you tell us the difference between a rating and
23 a share, please?

24 A Certainly. And I apologize if I slip into
25 jargon you use in -- and please, pull me out if I do.

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1 A rating is an absolute measure of how many homes
2 watch television. For instance, if you hear that a
3 network television show gets a 10 rating, that means
4 that 10% -- or Nielsen estimates, based on their 5,000
5 people meters -- they estimate that 10% of all of the
6 homes in the United States that have television
7 watched that show.

8 That's what a rating means. A share is
9 also a percentage, but it measures only the number of
10 homes. It's the same as a rating, except that it's a
11 percentage of all the homes that have their television
12 set on. So in almost every case, a share is going --
13 as a matter of fact, it has to be. A share is always
14 larger than the rating.

15 So a the rating measures is a percentage
16 of all the homes. A share is a percentage of all the
17 homes that have their television set on at that
18 particular time. So --

19 Q So if we just turn to Exhibit 31-X on the
20 second page and just take TBS as the first line, it
21 has a 1.55 rating, correct?

22 A Correct.

23 Q Okay. And then could you explain how that
24 translates to the share of 4.89 that's shown in the
25 fifth column?

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1 A Well, if you'll allow me to --

2 Q Sure.

3 A I believe the way we constructed this is
4 we actually showed the math. So if you take a 1.55
5 rating times the HUT, and it has to be represented as
6 a decimal which would be .317, that would then
7 translate into 4.89 or 4.89 share.

8 Q And that's what you meant by the share
9 always being larger because there's a smaller universe
10 of homes using television at a given time. The share
11 will be larger than the rating?

12 A Right. The share represents the viewing
13 in the homes that actually have the television set on.

14 ARBITRATOR FARMAKIDES: How does one
15 calculate that? In other words, you have a universe
16 of TV sets throughout the country.

17 THE WITNESS: Correct.

18 ARBITRATOR FARMAKIDES: And then you know
19 at any given point in time the percentage of those TV
20 sets that are turned on?

21 THE WITNESS: Correct.

22 ARBITRATOR FARMAKIDES: How do you do
23 that?

24 THE WITNESS: The Nielsens --

25 ARBITRATOR FARMAKIDES: By survey?

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1 THE WITNESS: Well, the Nielsens -- again
2 the 5,000 people --

3 ARBITRATOR FARMAKIDES: Oh, yes.

4 THE WITNESS: It knows whether the TV sets
5 are on or off.

6 ARBITRATOR FARMAKIDES: I'm sorry.

7 THE WITNESS: So it can -- for the rating,
8 it just counts the number of TV sets -- the number of
9 people tuned into that particular channel. To
10 calculate the share, it says okay, we're going to take
11 that number, but we then divide it by only the number
12 of TV sets that are on at that particular point in
13 time.

14 ARBITRATOR FARMAKIDES: Is it possible for
15 a central -- I'll use station. I don't mean system.
16 I don't mean -- station to monitor the TV sets that
17 are on directly in its cable system and know which TV
18 is turned on to what channel?

19 THE WITNESS: Stations cannot. However,
20 there is -- there has been technology that has been
21 employed in the cable industry that has allowed them
22 to literally monitor every single TV set --

23 ARBITRATOR FARMAKIDES: In the cable
24 system?

25 THE WITNESS: -- in the cable system, and

1 what channel that TV set was tuned to. It was called
2 the cube system.

3 ARBITRATOR FARMAKIDES: There was
4 congressional testimony on that insofar as I could
5 read the newspapers. But I'm not talking about only
6 a system. I'm talking also about a broadcast station,
7 for example. I was just using the word station just
8 to see if I could get some response to both of those
9 possibilities.

10 THE WITNESS: To my knowledge, there is no
11 means of a TV station from a remote location being
12 able to determine whether or not the TV set is on in
13 a particular household. No technology currently
14 employed in the marketplace is available to do that.
15 There actually are some technologies that are
16 currently being developed to be able to do that, but
17 not at the present time, to my knowledge.

18 ARBITRATOR WERTHEIM: With the cube system
19 as you've just described it -- and I haven't heard of
20 it before, but -- is that where -- put into effect on
21 all cable systems through the country put the data
22 that is collected and analyzed by computer and
23 dispensed with these proceedings?

24 ARBITRATOR FARMAKIDES: Well, the big
25 problem was the right of privacy issue. That's the

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1 problem that was being debated. And this flies in the
2 face of that problem.

3 THE WITNESS: Well, I have two comments to
4 that. One is that -- I'll go back to something
5 earlier I said, and that is there is -- clearly when
6 you look at both what is paid for programming, what
7 cable operators license programming for, and what
8 viewers watch, there isn't this perfect one to one
9 correlation between viewing and what things cost.

10 That's number one. So that complicates
11 the matter immediately. Secondly, there was a --

12 ARBITRATOR WERTHEIM: You wouldn't need --
13 ask the cable system itself to keep track of what it's
14 broadcasting or distributing.

15 THE WITNESS: It turned out that the cube
16 technology was very expensive to maintain and those
17 systems were shut down. Privacy was a major concern,
18 and they had to employ considerable security to make
19 sure that somebody didn't, you know, monitor who was
20 watching the Playboy channel and use that information
21 against them.

22 But there is some hope that in the somehow
23 distant future that a -- that the perfect rating
24 system would be developed. And every TV set and -- is
25 monitored and every program is measured. But until

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1 that day, there are only samples and surveys.

2 ARBITRATOR WERTHEIM: Well, this is
3 slightly off the subject, but I haven't yet been able
4 to understand why we can't simply have cable systems
5 report what programs they played, you know, hour by
6 hour. I mean, if they don't know what they're
7 carrying on their own system, who does? And you know,
8 it's a lot of data, but with computers there could be
9 -- very easily.

10 And why wouldn't that provide the answers
11 to these proceedings they're intended to estimate?

12 THE WITNESS: I'd be happy to take a stab
13 at that answer, Your Honor. And that is that any
14 cable system can tell you exactly what it is sending
15 down the pipe because indeed it is the network's
16 schedule. I mean, there is no mystery as to what it
17 is that they're feeding into the home. What they --
18 what is not --

19 ARBITRATOR WERTHEIM: -- copyright office
20 tell them to classify it in his category --

21 THE WITNESS: I mean, that's easy. The
22 problem is that they can't tell what channel the TV
23 set is tuned to and how much -- because there is no
24 return path. See, it's a one way system. The
25 information goes down. There is no mechanism for

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1 sending the information back and having that recorded.

2 ARBITRATOR WERTHEIM: You mean as to
3 program subscribers who actually watch it? Why would
4 you need to care about that? I mean, if the local
5 cable system is broadcasting or distributing I Love
6 Lucy throughout their system, then obviously the
7 program supplier for I Love Lucy -- without regard to
8 what number of subscribers actually have a set turned
9 on or even to that channel. Is that so?

10 We know that that cable operator or system
11 has to go in that number of hours that day to I Love
12 Lucy. What more do we need to know?

13 THE WITNESS: It is also sending down --
14 while it's sending down I Love Lucy, it may be sending
15 down 99 other channels, some of which might carry
16 local origination programming or some of which might
17 be carrying home shopping. And under that system
18 then, every hour would have completely equal value and
19 there would be no discrimination between home shopping
20 or a commercial and a program or a game.

21 I mean, it is an indiscriminate system.

22 ARBITRATOR FARMAKIDES: Do you really
23 care? Because it's the cable operator who makes the
24 decision. He's the one who's concerned about the
25 diversity in his system. So why couldn't you just

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1 measure that? As a matter of fact, if he's
2 unsuccessful, he's going out of business. If he's
3 very successful, his number of subscribers increase.

4 You know the number of subscribers that he
5 has and the cable networks. So why do you really have
6 to know the specifics of what he's watching or what
7 the subscriber is watching at any given point in time?
8 Why couldn't you simply stick with the cable operator,
9 the one who's making the decisions, and take that mix?

10 CHAIRPERSON JIGANTI: Mr. Lane, do you
11 like that idea?

12 MR. LANE: I think --

13 ARBITRATOR FARMAKIDES: We're just trying
14 to clarify for our own selves --

15 MR. LANE: I think if I say anything we'll
16 be here for four hours.

17 MR. GARRETT: You certainly have.

18 ARBITRATOR WERTHEIM: -- royalties are
19 paid to authors and publishers according to the number
20 of books sold. They don't go out and count how many
21 people actually read it.

22 THE WITNESS: But that's -- but now we're
23 --

24 CHAIRPERSON JIGANTI: Excuse me, Mr.
25 Gerbrandt. I think we're off the issue.

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1 BY MR. LANE:

2 Q Mr. Gerbrandt, sticking with Exhibit 31-X,
3 please, the second page, could you just briefly
4 explain what is contained in column seven?

5 A That is a -- the number there represents
6 the -- is a place holder number for the average basic
7 rate that the cable operator might charge a subscriber
8 per month.

9 Q And that would be for what?

10 A It would obviously vary depending on the
11 cable operator, but for whatever package of
12 programming that they would be offering for basic.

13 Q Now could you explain what column 13
14 represents for us?

15 A That was a calculation of the average
16 license fee that a cable network might charge a cable
17 operator.

18 MR. LANE: Those are all the questions I
19 have, Mr. Chairman.

20 CHAIRPERSON JIGANTI: Thank you, Mr. Lane.

21 MR. HESTER: If I may --

22 CHAIRPERSON JIGANTI: Mr. Hester, you may
23 inquire.

24 CROSS EXAMINATION

25 BY MR. HESTER:

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1 Q Good afternoon, Mr. Gerbrandt. My name is
2 Timothy Hester representing the Public Television
3 Claimants. I wanted to begin by going back to the
4 discussion that you've had with the panel today about
5 the significance of viewing hours and viewing
6 generation to the programming decisions that a cable
7 network might make.

8 You recall the discussion this morning
9 about that issue and specifically the question of the
10 ratio between programming expenses and viewing hours
11 and the reasons that a cable network might consider
12 that issue of viewing generation and making its
13 programming decisions. Do you recall that?

14 A Certainly it has a direct -- yes.

15 Q And let me just go back to some basic
16 principles here. I believe you said that cable
17 networks generate some 60% of their revenues from
18 advertising, is that right?

19 A It's a ball park figure. It seems a
20 little bit year by year, but historically that's been
21 a common number.

22 Q And of course, the value of advertising
23 that cable networks can sell would therefore be
24 heavily dependent upon viewing hours, is that right?

25 A Both the number of hours that they're on

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1 the air as well as the number of hours that their
2 programming is actually viewed.

3 Q Right. And so for a cable network, one
4 basis on which it would consider the value of the
5 programming it is placing onto its network would be in
6 terms of how much advertising hours it can generate
7 out of that programming, is that correct?

8 A That would be a -- certainly a
9 consideration.

10 Q Now the cable operator on the other hand
11 generates what, three to four to five percent of its
12 revenue from advertising?

13 A Let me do a quick calculation. I would
14 say that that's pretty much in the ball park.

15 Q And so the vast majority of 95% or more of
16 the cable operator's revenue flows from subscription
17 receipts, revenues from subscribers, and not
18 advertising, correct?

19 A That is correct.

20 Q So for the cable operator, when it thinks
21 about the type of programming mix it wants to carry,
22 does it follow that its principally concerned with the
23 type of programming that will generate and retain
24 subscribers -- that's the purpose of its business,
25 isn't it?

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1 A They're not unaware of the other -- of ad
2 revenue, but their first and overwhelming
3 consideration is the subscriber -- what impact it
4 will have on their ability to generate subscription
5 revenues.

6 Q So this morning when you discussed with
7 Mr. Lane the reasons that a cable network might have
8 some relationship between its programming expenses and
9 its viewing numbers, I take it you're talking about a
10 business that is heavily dependent on advertising?

11 A At the cable network level, that is
12 correct.

13 Q Right. The cable operator level is not
14 heavily dependent on viewing for its success, is it?

15 A That is correct.

16 Q It's dependent upon having a mix and a
17 range of programming that will attract and retain
18 subscribers, correct?

19 A That is correct.

20 Q Now let me go back to the question that
21 Judge Farmakides asked you this morning about the
22 Olympics. The Olympic package has been secured by one
23 of the broadcast networks, is that right?

24 A NBC, according to the news reports.

25 Q Now for NBC, its reason for acquiring that

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1 package is to generate advertising revenue, correct?

2 A That is certainly going to be the primary
3 source of revenue and value, although not the only.

4 Q Well, even insofar as it uses the Olympics
5 to generate promotions for its other programming, am
6 I correct that it's doing so in order ultimately to
7 generate advertising revenue for that other
8 programming?

9 A That is essentially the overwhelming
10 source of revenue, especially for the broadcast
11 networks.

12 Q So when we think about the behavior of a
13 cable network and we look at the relationship between
14 its programming expenses and the viewing generated,
15 does it surprise you that there is some rough
16 correlation there that you would see in the average
17 the figures that Mr. Lane generated where you see some
18 rough relationship between viewing and programming
19 expenses?

20 A No, it's not surprising that there would
21 be a rough relationship.

22 Q And there was also discussion this morning
23 of efficiency of different kinds of programming. Do
24 you recall that? This was based on I believe one of
25 the Kagan reports that Mr. Lane had showed you about

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1 the efficiency of different kinds of programming.

2 A We were talking about efficiencies of
3 particular program networks as opposed to specific
4 programs.

5 Q And program networks in terms of their
6 efficiency of generating additional viewing, is that
7 right?

8 A Not necessarily additional viewing. It
9 was a relative efficiency rating. It was a relative
10 ranking based on an efficiency rating that was defined
11 as program spending per rating point per hour.

12 Q And what exhibit are you referring to
13 there?

14 A It was not marked with a number, so -- but
15 it is the September 25, 1992 issue of Cable TV
16 Programming, page three of eight.

17 Q I believe that's Program Suppliers Exhibit
18 28-X. Let me just make sure you're looking at the
19 same one. And so, at the bottom of that document, you
20 talked about -- or the Kagan newsletter talks about
21 the reasons that a fractional ratings increase can
22 dramatically bolster efficiency. Do you recall that?

23 A That is a statement that is made there,
24 yes.

25 Q And again, you're talking about efficiency

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1 for a business, namely a cable network, that derives
2 more than half of its revenue from advertising
3 dollars, correct?

4 A That is correct.

5 Q Am I right that the same concept really
6 isn't applicable to a cable operator -- the concept of
7 efficiency, because the cable operator doesn't depend
8 significantly on advertising revenue for its business?

9 A I would say by and large that this kind of
10 analysis would not be applicable to an operator.

11 Q Now Mr. Lane was just discussing with you
12 a channel evaluation ranking, Exhibit 31-X, do you
13 recall that?

14 A Yes.

15 Q And if we look at the columns three and
16 four on that channel evaluation ranking, and let's
17 take TBS as an example, am I right that the values
18 that are ultimately derived are heavily dependent on
19 these ratings -- the ratings shown in column three are
20 what really drive the channel values shown in column
21 14?

22 A It's been some time since I've -- well,
23 it's been almost five years since I did this analysis,
24 so if you'll bear with me. I think the statement I
25 made on page one, which was ratings weighed the

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1 heaviest in the formula -- without going back and
2 recreating the analysis and doing the math, that was
3 the conclusion that I drew at the time.

4 Q Well, and to illustrate the point, for
5 instance, TBS which is ranked number one for cable
6 channel value in this document also is shown as having
7 the highest 24 hour rating, is that right?

8 A That is correct.

9 Q And USA network, which ranked second, is
10 shown as having the second highest 24 hour rating?

11 A That is correct.

12 Q Now let me just take a hypothetical here.
13 Let's assume that you had a cable system that had
14 1,000 subscribers who chose to subscribe to the system
15 because it carried the Discovery Channel. You have
16 1,000 subscribers that are very interested in the
17 programming on the Discovery Channel.

18 And that's why they have elected to
19 subscribe to that system, right? You with me so far?

20 A Could you --

21 Q I wanted you to assume a situation in
22 which the cable operator knows it has 1,000
23 subscribers that choose to subscribe because they get
24 access to the Discovery Channel. You have subscribers
25 that for whatever reason are interested in the type of

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1 programming they can get on the Discovery Channel.
2 Are you with me so far?

3 A I'll accept that as a hypothetical.

4 Q And I also want you to assume that that
5 cable operator knows that it only has ten subscribers
6 who give a wit about subscribing to the system because
7 they can get access to the USA channel. In other
8 words, it knows -- it's done research or it otherwise
9 knows that it only has ten subscribers in its whole
10 base that have decided to subscribe to the system
11 because they get access to USA, right?

12 A Okay, I'll accept that as a second
13 hypothetical premise.

14 Q Okay. Now in that circumstance, would you
15 agree with me that for that cable operator the
16 Discovery Channel is more valuable than the USA
17 channel for the cable operators business of attracting
18 and retaining subscribers?

19 A To the extent that 100 -- or in your
20 example, 100 times more subscribers subscribe purely
21 because of the Discovery Channel as opposed to USA, --

22 Q Right.

23 A -- it would certainly have generated more
24 subscriptions.

25 Q And in other words, the cable operator

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1 could have subscribers who watch the USA channel. But
2 if they didn't have the USA channel, they'd still
3 subscribe. Are you with me again -- that the cable
4 operator knows that it has subscribers that it will
5 lose if it doesn't offer Discovery Channel. And in
6 that circumstance, isn't it true the Discovery Channel
7 is more valuable to the cable operator as a way of
8 attracting and retaining subscribers?

9 A We're talking a real hypothetical
10 circumstance here.

11 Q Right.

12 A And we're talking as if the only -- these
13 two channels, you know, don't coexist with others.
14 But that -- to the extent that subscribers --
15 customers subscribe specifically for -- to gain access
16 to those channels, I would agree with you -- that line
17 of reasoning.

18 Q And let me broaden the point a bit. Isn't
19 the broader point that's illustrated by that
20 hypothetical that the cable operator isn't in the
21 business principally of selling advertising time based
22 on ratings; but instead, is in the business of selling
23 and retaining subscribers?

24 A That is absolutely true.

25 Q And so the cable operator may well value

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1 certain kinds of programming in terms of their ability
2 to attract and retain subscribers in ways that would
3 not be reflected in the average day ratings, correct?

4 A That is correct. Indeed, cable operators
5 often choose to carry channels before they know what
6 the ratings are, before they came out in the
7 marketplace.

8 Q And cable operators may carry channels
9 that don't generate the highest day ratings viewed in
10 the way reflected in Exhibit 31-X, but for one reason
11 or another, help it to either attract or retain
12 subscribers, correct?

13 A Are we talking just basic channels, or --

14 Q Yes, basic.

15 A Okay.

16 ARBITRATOR WERTHEIM: Would that include
17 basic expanded?

18 MR. HESTER: Sure. I didn't mean to be so
19 confining.

20 THE WITNESS: Well, no. I mean, there are
21 clearly channels that are -- a pay channel for which
22 advertising is not an issue that have a different
23 economic impact. But ratings are not the -- would you
24 mind --

25 BY MR. HESTER:

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1 Q Sure.

2 A I've gotten a little off track here. I
3 want to make sure I answer your question directly.

4 Q I don't know if I can do it again, but let
5 me try. The point is that a cable operator may well
6 elect to carry certain channels that it believes
7 helped to attract or retain subscribers even if
8 they're not the highest ranked in terms of the 24 hour
9 ratings shown on Exhibit 31-X.

10 A I would say that that is generally true,
11 yes.

12 Q And so, for instance, a cable operator in
13 making its judgements about the programming to carry
14 wouldn't simply march down the list of the highest
15 ranked cable networks in terms of a 24 hour day
16 rating. That wouldn't be the way a cable operator
17 would go about making its programming judgements, is
18 it?

19 A Well, let's understand that you don't have
20 cable operators entering the business. I mean, nobody
21 is really starting from scratch here.

22 Q Right.

23 A So you know, in the real world, the
24 networks are already carried, and the issue becomes
25 what do we -- if an operator has additional channel

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1 capacity, what do they add incrementally? So I'm not
2 sure I can entirely answer the question in the
3 abstract because, you know, nobody's going from a
4 standing start.

5 Q But implicit in the cable operator's
6 decision to carry a mix of programming is an ongoing
7 -- that that mix of programming is the one best
8 calculated to retain its subscriber base?

9 A At some point along the way, clearly a
10 decision was made to put together a package of
11 programming that was designed to attract a customer.

12 Q And again, just to restate the point, in
13 making judgements about what's designed to attract the
14 customer, that's not necessarily the same thing as
15 which cable network has the highest day rating. It's
16 just -- it's not the same question, is it?

17 A No, they may happen to be the same -- they
18 may happen to be a highly rated network that was
19 chosen, but that is not, to my knowledge, the criteria
20 that cable operators use in making those kind of
21 channel choices.

22 CHAIRPERSON JIGANTI: Mr. Hester, is this
23 convenient for a break?

24 MR. HESTER: Sure, that's fine, Your
25 Honor.

1 CHAIRPERSON JIGANTI: Take a ten minute
2 break.

3 (Whereupon, the proceedings went off the
4 record from 3:35 p.m. until 3:47 p.m.)

5 CHAIRPERSON JIGANTI: Okay, you may
6 proceed, Mr. Hester.

7 CROSS EXAMINATION (continued)

8 BY MR. HESTER:

9 Q Mr. Gerbrandt, let me ask you one more
10 question along the lines before we took the break, and
11 then I'll move to a new subject. There was a question
12 from the panel this morning, I believe, to the effect
13 that if the object of a cable network was cash flow or
14 generating viewing, why wouldn't it be more valuable
15 to have a certain kind of programming that generated
16 significant amounts of viewing at lower cost.

17 Do you recall that discussion? It was in
18 relation to a discussion of "Nick," I believe. And
19 the question was why wouldn't Nickelodeon's
20 programming be "more valuable" because it was
21 generating significant amounts of viewing at a
22 proportionately lower program expense. Do you recall
23 that discussion generally from this morning?

24 A Generally, yes.

25 Q And in certain of your tables -- for

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1 instance, if you look at page 24, you see the
2 reference there to Nick having a share of -- or a
3 ratio of programming spending to viewing of .3, for
4 instance, in 1990. Do you see that?

5 A I do.

6 Q And I believe the question from the panel
7 was to the effect that why wouldn't that kind of
8 programming be more valuable if the object is to
9 generate viewing. And my question to you is simply to
10 confirm again, is that an issue that is pertinent to
11 the cable network which is desirous of generating
12 viewing to support its advertising activities?

13 A Well, the network -- I think we were
14 talking about networks trying to stay in business.
15 And in order to stay in business, it's incumbent upon
16 a network to try to balance the cost of programming
17 versus the advertising revenue it can generate from
18 that programming. I mean, if you consistently spend
19 more on programming and to run the network than what
20 you generate in ad revenue, you don't stay in business
21 long term.

22 Q And that's a proposition that would be
23 applicable to a cable network. That same observation
24 really doesn't apply to a cable operator?

25 A A cable operator runs on a different

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1 dynamic. I mean, they certainly want to be able to
2 charge more for their package of services than what it
3 costs them to license those services.

4 Q But that's a matter that wouldn't depend
5 on viewing as to individual programming services,
6 would it?

7 A Not at the operator level.

8 Q Okay, do you recall yesterday giving
9 testimony about the proposition that affiliation fees,
10 the licensing fees, paid by the cable operators to the
11 cable networks are sometimes different from the top of
12 the rate card rates? Do recall generally Mr. Garrett
13 asking you about that?

14 A I do.

15 Q And at the end of the day yesterday, do
16 you recall I asked you to give some further
17 consideration to your testimony on that subject and to
18 consider it over night?

19 A I do.

20 Q And have you given some further
21 consideration to the question of what the relationship
22 is between the affiliate fees you see charted in the
23 marketplace and the top of the rate card rates?

24 A Yes.

25 Q Could you please explain what that

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1 relationship is?

2 A Well, in thinking about the issue further,
3 the range can be as much as no discount -- in other
4 words, nobody gets a volume discount off rate card.
5 The rate card is what everybody in the industry pays.
6 So the top of rate card is the average as well. And
7 the range can be as much as -- there might be a rate
8 card fee, but as an inducement to carry the network,
9 the network may actually have no charge for a number
10 of years.

11 So the range is between those extremes,
12 zero and 100%. If I recall correctly, when you take
13 most of the networks that we track and actually do the
14 math, the average works out to be about -- the average
15 discount from rate card is about 1/3. Or another way
16 of saying that is that the average fee is about --
17 somewhere around 2/3 of the top of the rate card.

18 Q And again, just to be clear here, we're
19 talking about the fees paid by cable operators for
20 carrying different cable networks. That's the kind of
21 fee you're talking about here?

22 A Yes.

23 ARBITRATOR WERTHEIM: Excuse me, Mr.
24 Gerbrandt, my recollection is you told us earlier that
25 the average actually paid is something like 50% of the

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1 top of the rate card. So you're modifying your
2 testimony now in that regard?

3 THE WITNESS: I am. On further
4 reflection, I overstated the discount. I mean, I knew
5 it was 100 at one end and zero and the other and
6 figured that the middle would be -- that the average
7 would be somewhere in between. As it turns out, it's
8 -- when I think about it, it's closer to 2/3.

9 BY MR. HESTER:

10 Q And so for some cable networks, the -- in
11 your experience, do they in fact charge very close to,
12 if not identical, to their top of rate card as their
13 fee?

14 A There are some -- to my knowledge, there
15 are some networks that indeed start out in that
16 fashion and cue to that.

17 Q And so when you talk about an average of
18 a 2/3 top of rate card fee, you're talking about an
19 average paid by all cable operators nationwide for
20 carrying a given cable network, right?

21 A Yes. I mean, it's -- any one cable
22 operator might be paid more or less than that average.
23 But if you in aggregate take then all together, that's
24 about where it comes out.

25 Q And so for some cable operators, even if

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1 you see on average a discount of about 1/3 off of rate
2 card, some cable operators may in fact be paying the
3 rate card fees, is that right?

4 A Correct. And some may be paying half.

5 Q Okay, so the point is that you can see
6 differences among cable operators and cable systems in
7 terms of how much of a discount they secure off of the
8 rate card rates?

9 A Yes.

10 Q And so for some cable operators, the rate
11 card rates can indeed be a quite real price, even if
12 for others there's a discount off of that price?

13 A There may be a few out there that wind up
14 paying close to the top of rate card on many of the
15 services.

16 Q And would that be what, smaller cable
17 operators that would tend to end up with prices that
18 are closer to the rate card?

19 A Yeah, the very smallest operators who
20 aren't affiliated for some reason with a buying co-op
21 of one sort or another.

22 Q Is one driver in looking at these
23 discounts off of the rate card the fact that you may
24 well have parties on both sides of the table -- in
25 other words, you may have a cable operator or a cable

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1 system that also has some affiliation with a cable
2 network?

3 A I'm not sure to what extent that enters
4 in. There are supposed to be arms length negotiations
5 that take place between cable network and cable
6 operator even if there is some common ownership
7 involved. And part of that's due to things like
8 favored nations clauses in contracts.

9 ARBITRATOR WERTHEIM: Mr. Gerbrandt, you
10 made a reference a moment ago to a cable operator
11 affiliated with a buying co-op. Is that what you
12 said?

13 THE WITNESS: Yes. There are --

14 ARBITRATOR WERTHEIM: Can you explain
15 that?

16 THE WITNESS: Certainly. There are at
17 least a couple of organizations that term themselves
18 co-ops. I am familiar with one to which a number of
19 small cable operators belong, and I'm also aware of
20 another one that a group of private cable operators
21 belong. And what they do is they negotiate with cable
22 networks on behalf of members of the co-op in order to
23 try to buy programming at better rates so that they
24 can qualify at least for some kinds of volume
25 discounts.

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1 ARBITRATOR WERTHEIM: How common is that
2 or how widespread is that through the industry?

3 THE WITNESS: To my knowledge, among the
4 smaller operators, it is not unusual to belong to an
5 organization or to participate in an organization such
6 as that. I mean, there are some off sets to that, and
7 that organization takes a fee in exchange for
8 providing that service. But usually that fee is more
9 than off set by the discount it's able to generate by
10 the volume.

11 Having said that, I've not done any sort
12 of thorough study of who belongs and who does not.
13 It's just based on my general knowledge of the
14 industry.

15 ARBITRATOR WERTHEIM: Thank you.

16 BY MR. LANE:

17 Q Now as we've discussed before, when the
18 cable operator is paying an affiliate fee to the cable
19 network, that's one of two main sources of revenue for
20 the cable network, correct? The other being
21 advertising.

22 A That is correct.

23 Q And would you agree with me that the
24 affiliate fees would be higher -- the level of
25 affiliate fees would be higher if the cable network

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1 did not have this other source of revenue, namely the
2 advertising revenues?

3 A Well, if advertising didn't exist, the
4 only source of revenue to a cable network then would
5 be the affiliate fees. And they -- the cable operator
6 would in essence have to make up for the absence of
7 the advertising revenue to buy the equivalent kind of
8 programming.

9 Q And would you agree then inherent in the
10 negotiations over the affiliate fees is a recognition
11 that this -- that these fees, these affiliate fees,
12 are not the only source of revenue for the cable
13 network, that it does have this other source of
14 revenue to support its business?

15 A I would say operators are certainly aware
16 that the network is generating advertising revenue.

17 Q And I think the point is probably
18 reflected, isn't it, if you look at pages 50 to 51 in
19 your testimony? If I could ask you to turn to those.

20 ARBITRATOR WERTHEIM: Before you get to
21 that, let me ask is it common for a system with a very
22 large subscriber list to get an affiliate fee that is
23 fewer cents per subscriber because it's providing a
24 larger audience to generate advertising revenue for
25 the network?

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1 THE WITNESS: The cable network is first
2 interested in gaining carriage. The audience comes
3 secondarily, but essentially the network in many cases
4 offer an operator a buying discount based on the
5 number of subscribers that it -- or the number of
6 systems with subscribers in which it agrees to launch
7 and carry that cable network.

8 CHAIRPERSON JIGANTI: Can you describe it?
9 Can it be described in terms of a buyer's market or a
10 seller's market at the present time?

11 THE WITNESS: At the present time from a
12 cable operator's perspective, it is a buyer's market.

13 CHAIRPERSON JIGANTI: And in 1990, 1991,
14 and 1992?

15 THE WITNESS: I would say it has been a
16 buyer's market since at least the early 1990s, if not
17 the very late 1980s.

18 ARBITRATOR WERTHEIM: Is that primarily
19 because of the restraints in the channel protection?

20 THE WITNESS: Yes, partially it's that.
21 Partially is that there are more -- cable networks
22 have become -- have proven themselves to be valuable
23 entities in their own right. There have been multiple
24 programmers who have wanted to try to create the same
25 kind of value. There have been more of those and a

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1 paucity of channels on which to carry those.

2 Secondary, there have been -- there's rate
3 regulation market place that has severely limited the
4 cable operators willingness or even ability to add a
5 channel and then appropriately charge for it. So
6 there's both a technological restriction as well as a
7 regulatory barrier to adding channels that's created
8 this buyer's market.

9 BY MR. LANE:

10 Q And circling back to that point, that
11 suggests, doesn't it, that the cable network has a
12 strong incentive to keep the affiliate fee low to
13 ensure carriage?

14 A The cable network would like to charge as
15 high a fee as possible. The cable operator would like
16 to pay as low a fee as possible. So a negotiation
17 takes place. That's what ultimately generates the
18 numbers that we have seen.

19 Q But in overlay to that negotiation is a
20 recognition on both sides of the table it's 60 percent
21 of the cable network's revenue is going to come from
22 advertising so that the cable network has its strong
23 incentive to keep its affiliate fees down.

24 A To the extent that a cable network can
25 keep its fees down at least in early stages, it is

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1 generally incumbent upon it to do so in order to try
2 to gain carriage. At the same time, later in a
3 network's life, they would like to raise the fees
4 because it allows them then, it gives them more
5 revenue with which to find more programming or more
6 expensive programming that allows them then to
7 generate more ad revenue.

8 Q I wanted to direct your attention in that
9 regard to pages 50 and 51 of your testimony. These
10 are the exhibits dealing with license fees and
11 programming and production expense. Is that right?

12 A That is correct.

13 Q Without getting into the specifics of
14 different networks, in the aggregate, these two tables
15 reflect that the license fees are less in the
16 aggregate for these networks than are the programming
17 and production expenses. Correct?

18 A That is correct.

19 Q So viewed in that aggregate sense, the
20 affiliate license fees are not covering by themselves
21 all of the programming and production expenses being
22 incurred by these networks?

23 A That is as certainly in a broad industry
24 average, that is correct.

25 Q So if anything, I take it the affiliate

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1 license fees are below market as a measure of value of
2 the programming?

3 A There are cases, individual cases, where
4 the fees may be higher than the programming costs.
5 But again, in the aggregate they are less than what it
6 costs to acquire and produce the programming.

7 Q And so you would agree that in the
8 aggregate, I'm not asking you about each specific one,
9 but in the aggregate, the license fees are if anything
10 below market as a measure of the value of the
11 programming?

12 A I'm a little troubled by your term below
13 market, but they are below what the networks have
14 acquired the programming for in the market place.

15 Q Well, and let me pursue that for just a
16 moment. If you had a situation where the cable
17 network did not receive any advertising revenues and
18 its only source of revenue was the license fee, I take
19 it you would agree with me in that circumstance, the
20 product of that arms-length negotiation might well
21 lead you to a judgement about market value as viewed
22 by the supplier and the buyer of that service.
23 Correct?

24 A It could.

25 Q But that's a circumstance we don't see in

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1 the market place today because in fact there's another
2 source of revenue aside from the license fees, namely,
3 the advertising revenues.

4 A Correct.

5 Q So my point is, I think a simple one, that
6 when we look at the license fees, although they may be
7 a bench mark of market value, they are likely to be
8 below market value because you have another source of
9 revenue that's not accounted for in the license fees
10 that we observe here. Do you agree with that?

11 A I guess broadly, yes, in that the license
12 fees certainly don't reflect the full revenue
13 generating capacity of that programming.

14 Q The broader point which one could make
15 outside the context of the specific data is that if
16 you have a negotiation between two parties and one
17 party is receiving a separate stream of revenue that's
18 not accounted for in that negotiation, you can't look
19 at the outcome of that negotiation as the total market
20 value. Right?

21 A No. And understand of course that cable
22 networks can choose to spend more on a particular
23 program than they receive in license fees or ad
24 revenue. That is, on a specific program. They have
25 to go out into the market place and acquire that

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1 programming and make those acquisitions of their own
2 free will.

3 Q But over time that's not something that
4 would approximate what the market would produce, is
5 it? A situation where the programming network was
6 perpetually paying more than it was receiving?

7 A In total aggregate revenue, over a long
8 period of time not likely.

9 Q It couldn't be sustained, right?

10 A Not unless somebody were wanting to lose
11 tens of hundreds of millions of dollars over a
12 sustained period of time.

13 Q You had mentioned, I believe yesterday, a
14 number of I thought it was 12 to 14 minutes of
15 advertising time per hour. Do you recall that?

16 A Yes. I do.

17 Q And I believe you were discussing the
18 amount of advertising time that one sees on cable
19 networks. Is that what the reference was to?

20 A Yes.

21 Q Do you know the comparable number for the
22 amount of advertising one would see on a broadcast
23 network? Is it about the same, 12 to 14 minutes an
24 hour?

25 A It has been some time since I have

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1 researched that number. My recollection is that it's
2 somewhat less, but not by a significant number.

3 Q Can you quantify what you mean when you
4 say somewhat less?

5 A Network programming may have -- whereas a
6 cable network range might be 12 to 14, a broadcast
7 network might be including the amount of time it
8 returns to its affiliates, it might be 10 to 12, 11 to
9 12, something in that range.

10 Q And how about for super stations?

11 A Super stations usually the programming is
12 somewhere in the 12 minute per hour range. Again,
13 given programs can be a little bit more, a little bit
14 less.

15 Q You mean that advertising would be in the
16 range of 12 minutes per hour?

17 A Correct.

18 Q Let me ask you to look at page seven of
19 your testimony, please. I wanted simply to clarify a
20 point that you made yesterday. You refer to the
21 programming on the five networks you list on this page
22 as non-sports programming. Do you see that?

23 A Correct.

24 Q And I take it that at various places later
25 on in your testimony where you refer to non-sports

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1 programming, you are referring back to this as a
2 defined term. Is that right? In other words, you are
3 referring to the programming on these five networks
4 when you refer in your testimony to non-sports
5 programming?

6 A Correct.

7 Q And this mix of channels that you studied,
8 Nickelodeon, TNT, USA, Lifetime and the Family Channel
9 was not intended to reflect the mix or type of
10 programming one would see on public television. Is
11 that right?

12 A No. We were referring specifically to
13 super stations there.

14 Q Commercial stations?

15 A Correct.

16 Q Are there particular types of cable
17 networks that you would identify as being more closely
18 similar to the types of programming one sees on public
19 television?

20 A I suppose if I thought about it I could
21 cite some examples.

22 Q How long would it take you to think about
23 it? I know it's late. Arts and Entertainment, is
24 that one that you would cite as a comparable type of
25 cable network?

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1 A It carries -- yes, it does carry
2 programming that one would see on a non-commercial or
3 educational or PBS type station.

4 Q The Discovery Channel would be another
5 one?

6 A It does contain both educational and
7 information programming comparable in many respects to
8 programs that are carried on the non-commercial
9 stations.

10 Another one that may come to mind is the
11 Learning Channel.

12 Q Okay. Let me ask you to turn to page 11.
13 Again, I think this is a point of simply
14 clarification. Here, you in these bullet points you
15 refer to shares of program expenses. Do you see that?
16 For instance, major league baseball on ESPN share
17 program expenses. In each of these bullets you are
18 referring to a share of program expenses. Do you see
19 that?

20 A Yes.

21 Q I take it you are referring to the share
22 of program expenses among the category programming
23 that you've studied?

24 A That is correct.

25 Q And so again, this is not a category that

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1 included public television type programming?

2 A That is correct.

3 Q You said in your testimony this afternoon
4 that brand names sell subscriptions. Do you recall
5 that? You said that there were brand names of cable
6 networks that help to sell subscriptions. I believe
7 you mentioned ESPN as one such brand name?

8 A Yes.

9 Q Are there other brand names that in your
10 experience have been used by cable systems to help
11 sell subscriptions?

12 A Yes.

13 Q Which other ones are you thinking of?

14 A CNN certainly comes to mind. MTV may be
15 one of the more effective campaigns, in history has
16 been I want my MTV. Nickelodeon on the pay side.
17 Certainly HBO and Disney Channel are well known brand
18 names.

19 Q Have you seen occasions when cable
20 operators have used Arts and Entertainment as one
21 network that they feature in their advertising and
22 promotional materials?

23 A I have seen A&E listed in promotional
24 literature.

25 MR. LANE: Thank you, Mr. Gerbrandt.

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1 Those are all the questions that I have.

2 CHAIRPERSON JIGANTI: Thank you.

3 Anything, Mr. Hester? Ms. Hand?

4 CROSS EXAMINATION

5 BY MS. HAND:

6 Q Good afternoon, Mr. Gerbrandt. I am
7 Jacqueline Hand on behalf of the National Association
8 of Broadcasters. As you may know, we are here
9 representing US commercial television stations for
10 their station produced program.

11 I just have one point I want to clarify.
12 Do you recall testifying a moment ago in response to
13 Mr. Hester's question that on page seven of your
14 testimony you selected five cable networks as
15 representative of the programming on super stations.
16 Do you recall testifying to that?

17 A As comparable to the movie and syndicated
18 programming shown on super stations and other
19 commercial distant signals.

20 Q So it is fair to say that these five cable
21 networks are not representative of the news and public
22 affairs programming that appears on super stations and
23 commercial television stations. Is that right?

24 A That is correct.

25 MS. HAND: Okay. I have no further

1 questions. Thank you.

2 CHAIRPERSON JIGANTI: Any other cross
3 examination of Mr. Gerbrandt?

4 CROSS EXAMINATION

5 BY MR. GARRETT:

6 Q Mr. Gerbrandt, you flew in from Hong Kong
7 on Sunday. Did you not?

8 A I did.

9 Q And you've been here for two days
10 testifying?

11 A Yes. I have. It feels longer somehow.

12 Q You are pretty tired.

13 A I am. If you don't mind, just give me a
14 moment. My eyes -- I'm afraid I'm not quite used to
15 the big city. Living in Carmel spoiled me for
16 pollutants.

17 MR. GARRETT: Usually witnesses don't cry
18 until after I'm done.

19 CHAIRPERSON JIGANTI: Your own witness at
20 that.

21 MR. GARRETT: Well, the ones that fear me
22 the most, Your Honor.

23 THE WITNESS: I just notice my eyes have
24 been irritated this afternoon. I am fine.

25 MR. GARRETT: I'll try to make this brief,

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1 but this is important to me. You understand that,
2 don't you, Mr. Gerbrandt?

3 (No response.)

4 CHAIRPERSON JIGANTI: You know,
5 considering the circumstance, we could take a break.
6 We're about due for a break, if you intend to question
7 a little while, we should take a break any way.

8 MR. GARRETT: I don't think it'll take
9 more than about 15 minutes, but it's up to the
10 witness.

11 CHAIRPERSON JIGANTI: Let's take a break.

12 (Whereupon from 4:22 p.m. until 4:37 p.m.
13 the proceedings went off the record.)

14 CHAIRPERSON JIGANTI: Mr. Garrett, you may
15 proceed.

16 BY MR. GARRETT:

17 Q Mr. Gerbrandt, you have a lot of data here
18 in this report that you did for the Joint Sports
19 Claimants, don't you?

20 A Yes.

21 Q You have data concerning amounts that
22 cable networks paid to acquire programming. Correct?

23 A Correct.

24 Q You have data on amounts that cable
25 operators paid in order to distribute that cable

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1 network programming?

2 A Yes.

3 Q You have viewing hours data. Correct?

4 A Correct.

5 Q You have a lot of different ratios and
6 percentages and similar types of material?

7 A Yes.

8 Q You understand that the purpose of this
9 proceeding here is to allocate 500 million dollars in
10 royalties that cable operators paid in order to re-
11 transmit to super station at the distant signal
12 programming during the years 1990 to 1992?

13 A That is my understanding, yes.

14 Q And you had talked earlier about the chain
15 between the program owners, super stations, satellite
16 carrier, cable operator. Do you recall that?

17 A Yes. I do.

18 Q We're talking about now is the royalty the
19 cable operators ultimately pass on to program owners
20 through this panel. Correct?

21 A That is my understanding.

22 Q Focusing on the report that you have done
23 for the Joint Sports Claimants, what is the most
24 important information that you have presented?

25 A I think it really boils down ultimately to

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1 the data that is graphically represented beginning on
2 page 27. It's table B-7 for 1990, B-8 for 1991, and
3 B-9 for 1992.

4 What we did in those -- the end result of
5 the calculations was to establish the relationship
6 between the expense, the programming costs share
7 related to the viewing share of a mix of programming
8 that was equivalent to the kind, the mix of sports and
9 non-sports programming that would be found on a super
10 station.

11 Since there isn't this normal economic
12 chain on the super station side, we needed to look at
13 an analogous or a parallel market. We did so by
14 focusing in on a mix of cable networks that offered
15 movie and TV series, as well as a mix of sports, and
16 then looked at the value relationship between what was
17 spent on that programming and the viewing that it
18 generated.

19 Q And the data that you have here on pages
20 27, 28, and 29, are all derived from the raw data on
21 pages 53 and 54. Is that correct?

22 A That is correct.

23 Q Let me just ask you on page 54, we see
24 there that in 1990, ESPN paid 100 million dollars over
25 to televise a number of major league baseball games.

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1 Correct?

2 A That is correct.

3 Q Now that 100 million dollars represents
4 the amount that is actually negotiated in the market
5 place between ESPN and major league baseball.
6 Correct?

7 A Yes. It does.

8 Q This reflects the amount that was paid to
9 baseball in arms length negotiations?

10 A In an open and competitive market place.
11 That is correct.

12 Q And these were negotiations with a willing
13 buyer and a willing seller?

14 A Certainly.

15 Q ESPN may have made a bad judgement. Might
16 they not have?

17 A They may have paid too much for
18 programming relative to the ratings that eventually
19 generated.

20 Q And baseball may have made a bad deal too.
21 Correct?

22 A There may have been other bidders who
23 might have been willing to pay more for a slightly
24 different package of programming or slightly different
25 length of time or other nights. But it's possible

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1 there could have been other bidders.

2 Q I guess if we look at this in hindsight,
3 either side may have a good argument that it made a
4 good deal or a bad deal. Correct?

5 A That's the nature of free market
6 negotiations.

7 Q But nevertheless, that 100 million dollars
8 represents ESPN's best judgement as to what those
9 baseball rights were worth in the year 1990. Correct?

10 A I would say that is correct.

11 Q And the 100 million dollars represents
12 baseball's best judgement as to what they were willing
13 to part with their rights for in 1990. Correct?

14 A That's correct.

15 Q Now does ESPN have a reputation of being
16 bad businessmen?

17 A No. I think they are generally highly
18 regarded as businessmen in the industry.

19 Q Now I could ask you the same series of
20 questions, could I not, about each of the other types
21 of programming expenses there on page 54. Couldn't I?

22 A My understanding is that each of those
23 deals took place in an open and competitive market
24 place.

25 Q And for example, the 37.5 million dollars

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1 that Family Channel spent for all of its programming
2 represented the best judgement of Family Channel as to
3 what all that programming was worth?

4 A I would agree with that.

5 Q You have looked at what each of these
6 networks paid there on page 54. We total up all the
7 programming that was covered, and we counted 157
8 million dollars that was spent on sports programming
9 in 1990. Correct?

10 A Correct.

11 Q And about 440 million dollars that was
12 spent on the non-sports programming. Correct?

13 A Correct.

14 Q And you've done here on page 27 of the
15 chart that you've referred to, do you see an expense
16 share?

17 A Yes.

18 Q Under sports programming of 26.3 percent?

19 A Yes.

20 Q And how was that calculated?

21 A That was calculated by dividing 157 by the
22 total of the sports and non-sports programming, which
23 would be 57 plus 439.5. That would be 596.5 million
24 dollars.

25 ARBITRATOR WERTHEIM: Excuse me. What

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1 chart are you referring to, Mr. Garrett?

2 MR. GARRETT: The chart on page 27 labeled
3 B-7 under the line sports programming expense
4 percentage of 26.3 percent.

5 ARBITRATOR WERTHEIM: Thank you.

6 BY MR. GARRETT:

7 Q On page 27, that same chart we just
8 referenced, you also have viewing percentages. Do you
9 see that?

10 A Yes. I do.

11 Q Those viewing percentages were calculated
12 based on the data there on page 53. Correct?

13 A That is correct.

14 Q And could you briefly describe how you
15 calculated those viewing percentages for sports? You
16 have a sports viewing percentage of 4.3 percent.

17 A Correct.

18 Q If I direct your attention to page 53, how
19 did you determine that 4.3 percent number?

20 A Well, for 1990, we took the total. If
21 you'll see the line says sports total, 800,907. Eight
22 hundred million nine hundred and seven, and divided
23 that by the group total, which would be 18 billion 797
24 million. That generates a percentage of 4.3.

25 Q You calculated those viewing shares using

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1 the same concept that the MPAA has used in this
2 proceeding. Did you not?

3 A Comparable concept. Correct.

4 Q Now the sports viewing share of this cable
5 programming for 1990 is how much?

6 A It was 4.3 percent.

7 Q For 1991, it was how much?

8 A 4.8 percent.

9 Q And for 1992?

10 A 4.7 percent.

11 Q Now if you go back and look at what the
12 cable networks actually paid for all of this
13 programming, what was sports' share in 1990?

14 A 26.3 percent.

15 Q And for 1991?

16 A 25.5 percent.

17 Q And for 1992?

18 A 24.9 percent.

19 Q Now, Mr. Gerbrandt, I want you to assume
20 for a moment -- strike that. Turn to page 54 again of
21 your testimony, please. I want you to assume for the
22 moment that Congress had granted cable networks a
23 compulsory license to acquire all of the programming
24 shown here on page 54. Can you assume that for a
25 moment?

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1 A Okay.

2 Q I want you to assume further that Congress
3 determined that all of that programming -- strike
4 that. Assume further that Congress determined that
5 the cost of all of the programming in 1990 was the
6 596.5 million dollar figure that you gave me. Okay?

7 A Okay.

8 Q That's the 157 million dollars for sports
9 programming and 440 million dollars for the non-sports
10 programming. Okay?

11 A Okay.

12 Q All right. So Congress said that 440
13 million dollars --

14 A Five hundred --

15 Q Five hundred and --

16 A Ninety six.

17 Q -- million dollars is what it's going to
18 cost for the cable networks to acquire all that
19 programming. Can you assume that?

20 A Okay.

21 Q I want you to assume that Congress said
22 copyright owners of all that programming are to
23 receive a share of that 596 million dollars that
24 equates with the viewing of that programming. Can you
25 assume that?

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1 A Okay.

2 Q What would the sports interest receive
3 under that hypothetical?

4 A If it was based just on viewing, 4.3
5 percent of the 596. It would be approximately 25.6
6 million dollars, 26 million dollars.

7 Q 25.6 million dollars. Now I'll ask you
8 again, what was actually paid for all of that
9 programming by the cable networks during the year
10 1990?

11 A A hundred and fifty seven million
12 dollars.

13 Q A hundred and fifty seven million dollars?

14 A Correct.

15 Q Again, if we have a compulsory license
16 that just goes to the programming shown here on page
17 54, and all the royalties paid for that programming is
18 to be allocated according to viewing, sports would get
19 25.6 million dollars. Correct?

20 A Correct.

21 Q And if we look at what actually happened
22 in the marketplace, sports interests came away with
23 157 million dollars? Is that right?

24 A That is correct.

25 Q Now what if we did the same analysis here

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1 for 1991. I want you to assume for a moment that all
2 of the royalties, that we have the same compulsory
3 license for these cable networks.

4 A Okay.

5 Q Further assume that Congress has directed
6 from accounting page to allocate them according to a
7 viewing formula. What would sports' share be in 1991?

8 A First of all, the number equivalent to 596
9 would be 749, times 4.8 percent. They would get 40
10 million dollars.

11 Q Forty million out of the 749 million
12 dollars. Correct?

13 A Correct.

14 Q That's if we're using a viewing formula?

15 A Correct.

16 Q And we know what was actually paid in free
17 market place transactions for that programming, don't
18 we?

19 A Yes. We do.

20 Q What was paid?

21 A A hundred and ninety one million dollars.

22 Q So the difference between that viewing
23 formula and what actually happened in the marketplace
24 was that sports came away with about 150 million
25 dollars more. Right?

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1 A Yes.

2 Q Let me ask you to do the same analysis for
3 1992. We have a compulsory license for all the
4 programming here on page 54, and Congress has directed
5 that that amount that's paid for the programming is to
6 be distributed according to a viewing formula. What
7 would the sports programming get?

8 A Forty one million dollars.

9 Q Using that 870 million dollars?

10 A Yes.

11 Q And you get 41 million dollars?

12 A Yes.

13 Q And how much was actually paid in the free
14 marketplace for that programming in 1992?

15 A Two hundred and seventeen million dollars.

16 Q Now quickly, if we look at the difference
17 between what that sports programming would have gotten
18 under a viewing formula and what it actually got in
19 marketplace transactions for all three years, what
20 would the difference be for sports?

21 A We would take 157 minus 26. That would be
22 131 million dollars in that case. I think I can do
23 that one in my head. It's 151.

24 Q And for 1992?

25 A A hundred and seventy six.

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1 Q So over a three year period, the
2 difference between viewing and what we actually got
3 was something of the magnitude of over 400 million
4 dollars. Is that correct?

5 A Four hundred and fifty eight million
6 dollars.

7 Q Okay. It pays to add up. Now we had also
8 talked earlier today, I had some questions for Mr.
9 Lane with the panel about a somewhat different concept
10 of viewing. That was the amount of time that
11 programming was actually broadcast. Do you recall
12 that?

13 A Yes.

14 Q The amount of time the cable operators
15 actually devoted to different types of programming.

16 Now I know you haven't done any hard
17 calculations here, but as a general matter if we just
18 simply looked at that time concept, how would that
19 compare to 4.3 percent of viewing for sports
20 programming here on page 54?

21 A Based on the fact that we're really
22 talking about a relatively small number of hours
23 against a network's total hours of broadcast. It
24 would be based on time, it would be far less than one
25 percent.

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1 Q So while we may have 4.3 percent of the
2 viewing here for this sports programming, the share of
3 just the time we'd probably be under one percent.
4 Correct?

5 A Yes.

6 Q So if one used that formula, you would
7 have an even bigger disparity between what baseball
8 actually received or I'm sorry, all these sports
9 interests received in actual marketplace transactions
10 versus the time that that program occupied. Right?

11 A If you did it on a time basis, what the
12 sports would get would be an almost insignificant
13 number. It would be a few million dollars, at best,
14 out of those figures.

15 ARBITRATOR WERTHEIM: You're speaking of
16 the proportion of all programming that was to go to
17 the sports in terms of hours?

18 MR. GARRETT: The question was actually
19 directed to the amount of time that the sports
20 programming occupied here on all the programming
21 listed on page 54 of the report.

22 I have no further questions.

23 ARBITRATOR FARMAKIDES: Are you going to
24 put that into the record?

25 MR. GARRETT: Yes.

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1 CHAIRPERSON JIGANTI: Are you going to
2 mark that as an exhibit?

3 MR. GARRETT: Yes. What I'll do is I'll
4 mark these two charts that we worked on yesterday and
5 today, we'll mark as Joint Sports Claimants Exhibit 8.

6 The chart that we had just created here,
7 will be marked as Joint Sports Claimants Exhibit 9.
8 I have already reduced the other two to 8.5 by 11. I
9 will do that with this one as well.

10 CHAIRPERSON JIGANTI: You have three
11 charts and now we have three exhibit numbers?

12 MR. GARRETT: Well, I thought, Your Honor,
13 that since these two were delivered together, it would
14 tend to be parallel. It made sense to keep them as
15 one exhibit, but I can certainly make them two, if
16 that is the panel's preference.

17 CHAIRPERSON JIGANTI: I prefer you make it
18 two exhibits there.

19 MR. GARRETT: That's fine.

20 CHAIRPERSON JIGANTI: There will be less
21 confusion.

22 MR. GARRETT: Then let's do it this way.
23 The chart showing the chain of distribution between
24 program owners and cable subscribers in the left
25 column and between program owners and cable

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1 subscribers in the right column will be marked as
2 Joint Sports Claimants Exhibit 8.

3 ARBITRATOR WERTHEIM: Well, all three of
4 them go from program owners to cable subscribers.

5 MR. GARRETT: You're right. So it doesn't
6 help to describe them that way.

7 ARBITRATOR WERTHEIM: The cable networks -
8 - (inaudible) -- broadcast networks.

9 MR. GARRETT: That's much better. Number
10 8 will be the chart showing the cable network and
11 super station, a chain of distribution.

12 Joint Sports Claimants Exhibit No. 9 will
13 show the chain involving broadcast networks.

14 Ten will show the difference -- chart no.
15 10 will reflect the difference between using viewing
16 numbers and actual marketplace transactions, the award
17 the sports interests would receive.

18 (Whereupon, the documents were
19 marked for identification as
20 JSC Exhibits Nos. 8, 9, and
21 10.)

22 MR. GARRETT: I will have all of those
23 reduced to 8.5 by 11 and submitted for the record
24 tomorrow, with the panel's permission.

25 CHAIRPERSON JIGANTI: All right. If there

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1 are no other questions by Mr. Garrett, are there
2 questions, Mr. Hester, do you have any questions?

3 MR. HESTER: No, Your Honor.

4 CHAIRPERSON JIGANTI: Who else? Mr. Lane,
5 any questions? Ms. Hand, any questions?

6 MR. GARRETT: You've got 15 minutes to
7 catch your plane.

8 THE WITNESS: Can you order a police
9 escort?

10 ARBITRATOR WERTHEIM: You can ask the
11 librarian.

12 CHAIRPERSON JIGANTI: Counsel, there are
13 some housekeeping matters I would like to take care
14 of.

15 THE WITNESS: I understand the importance
16 of the --

17 CHAIRPERSON JIGANTI: The first one, we
18 have two motions pending now. One of them has been
19 pending for a little while when this subject came up
20 before, of course the motion concerning Mr. Sieber, S-
21 I-E-B-E-R. The motion was filed on the eighth. We
22 don't have a response.

23 Mr. Lane, will you be responding to that?

24 MR. LANE: Yes, we will. We will respond
25 by tomorrow.

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1 CHAIRPERSON JIGANTI: Pardon me?

2 MR. LANE: Tomorrow.

3 CHAIRPERSON JIGANTI: Tomorrow, okay. We
4 have a motion that we just received. We're delighted
5 to receive it because it's long. That's a motion to
6 suppress the testimony of -- strike the testimony of
7 Paul Lindstrom.

8 MR. GARRETT: Actually, I believe there
9 are three motions.

10 CHAIRPERSON JIGANTI: There are three
11 motions there? I haven't seen them. I just have a
12 file there. They were filed today the 13th. Will
13 there be a response to those motions?

14 MR. LANE: There will be, but I haven't
15 had a chance to read them yet.

16 CHAIRPERSON JIGANTI: Okay, if you would
17 let us know about how long so that we know when we
18 should set aside some time to consider the motion.

19 MR. LANE: There's one other --

20 MR. GARRETT: Your Honor, before you move
21 off of those, I had indicated last Friday that if we
22 were unable to resolve certain issues concerning
23 underlying documentation, we would be filed those
24 motions. Those three motions all relate to a barrier
25 to produce documentation that the librarian ordered to

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1 be produced.

2 We have tried over the last couple of days
3 to work with what we had and see whether or not it's
4 sufficient. In some cases, we were able to do things.
5 In other cases we weren't. This relates here to
6 instances where we didn't get data and we absolutely
7 must have the data before we have to cross examine Mr.
8 Lindstrom.

9 In two cases -- in one case, I think it
10 relates to Dr. Besen's testimony.

11 CHAIRPERSON JIGANTI: The next matter I
12 have is the witnesses for tomorrow.

13 MR. GARRETT: Mr. Maglio is our final
14 witness. He'll be ready to go at whatever. We can do
15 it at 9:30 tomorrow or we can do it at 9:00, if that's
16 the panel's convenience. I understand the NAB's case
17 is ready to start in the afternoon tomorrow. I don't
18 know how long the cross examination of Mr. Maglio will
19 go, but he will be here and ready to go whenever the
20 panel wants him to go tomorrow morning.

21 CHAIRPERSON JIGANTI: Our normal procedure
22 is 9:30. Can anybody foresee a reason why we
23 shouldn't proceed at 9:30? Okay. We'll proceed at
24 9:30 tomorrow.

25 Then the witnesses for the afternoon?

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1 MS. HAND: That would be Dr. Ducey, NAB.

2 CHAIRPERSON JIGANTI: He will be the only
3 witness tomorrow?

4 MS. HAND: Yes.

5 CHAIRPERSON JIGANTI: From reading his
6 testimony, I could only imagine that, but I wanted to
7 make certain.

8 Are there any other housekeeping matters
9 that we have to discuss?

10 ARBITRATOR WERTHEIM: I'd just like to
11 raise a question about the motions to -- the two
12 motions to strike, the one a week ago and the other
13 one or three others filed today. All relate to the
14 direct case of the Program Suppliers, which is due to
15 commence, well technically next Wednesday, and resume
16 the second of January.

17 It occurred to me that those motions are going
18 to have to be dealt with before the second of January.
19 I suppose that suffice it to say we should know the
20 outcome before we break up on the 20th of December.
21 I realize that with the hearings going on, counsel are
22 pretty well occupied. We don't have any rule as to
23 when responses to motions should be filed, like some
24 standard five days or something like that. We're
25 doing our best to accommodate the parties. We also

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1 have the Fox question to be dealt with at some point
2 after the documents get filed on the 15th.

3 It would help if the parties themselves
4 might have some orderly procedure to suggest that
5 would accommodate the needs of the schedule in getting
6 these questions resolved without pressing overly hard
7 on a busy trial. Maybe you don't have anything to
8 suggest overnight or right now rather, but perhaps
9 sometime tomorrow after you've had a chance to
10 consider it, you can offer some suggestion.

11 We could just adopt some sort of rule.
12 All motions have to be responded to within a certain
13 number of days. I guess we could do that if that's
14 what the parties would prefer. But maybe there is
15 some other alternative that would be less rigid.

16 CHAIRPERSON JIGANTI: Anything further
17 today?

18 MR. HESTER: Your Honor, I had just one
19 housekeeping matter. The panel had asked us to submit
20 underlying source materials in relation to pleadings.
21 I wanted to hand up as reference the materials that
22 relate to PBS's opposition to NPAA's motion to strike
23 certain portions of the PBS case.

24 I doubt the panel is working on that
25 motion right now, but I thought I'd at least give you

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1 the source documents.

2 Simply for the record, we thought since
3 these are all public materials that we would not serve
4 them all on counsel, but we will make copies available
5 on request, and we're serving an index to the
6 materials on all parties.

7 ARBITRATOR WERTHEIM: These relate to the
8 motions that were referred to the panel by the
9 librarian?

10 MR. HESTER: Yes. There is a pending
11 motion brought by Program Suppliers in relation to the
12 PBS direct case. There are certain motions to strike
13 portions of our written case.

14 ARBITRATOR WERTHEIM: Well we're always
15 glad to have more to read, but I think you'll find
16 that the motion has already been ruled on by an order
17 signed today.

18 MR. HESTER: Oh. Well that's even better.

19 MR. GARRETT: Do you want to take those
20 back?

21 MR. HESTER: I don't know. Maybe I should
22 see what the order says.

23 All right. Then you can probably just
24 discard those. Sorry.

25 MR. GARRETT: Or leave them for one of the

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1 files for reconsideration.

2 MR. NEIMAN: Your Honor, in connection
3 with that, we have done the same thing with the
4 motions that were filed today, provided the source
5 materials. We should have those tomorrow. They were
6 provided up front. I don't know if they have gotten
7 to you yet.

8 CHAIRPERSON JIGANTI: Oh I see.

9 ARBITRATOR WERTHEIM: Well, Mr. Hester,
10 you were going to take this back or just add it to our
11 stack of papers?

12 MR. HESTER: Sure. I guess I can take it
13 back.

14 ARBITRATOR WERTHEIM: Unless there's
15 something in there you think would be more widely
16 used.

17 MR. HESTER: The only piece of any general
18 relevance I think might be this, there's a discussion
19 and an administrative law treatise on the use of
20 hearsay in administrative proceedings. I can give
21 that to you again if you need it.

22 MR. GARRETT: One last thing, Your Honor.

23 CHAIRPERSON JIGANTI: Yes.

24 MR. GARRETT: During the opening day of
25 our direct case, Mr. Farmakides had talked about the

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1 usefulness of a glossary. Of course we had done a
2 glossary of terms earlier that we withdrew.

3 I have discussed with the other counsel
4 our glossary and making their changes they thought
5 were appropriate so that we could submit it as a joint
6 document. I am hopeful that we can do that soon.

7 The question I had for the panel was
8 whether there were terms in addition to the terms that
9 we had listed in the glossary that you would like
10 defined. If so, if you could tell us what they are,
11 I'll undertake to try to see if we can't get agreement
12 with the parties on a proper definition.

13 ARBITRATOR WERTHEIM: I don't think we
14 need it in the glossary, but I have thought a couple
15 times I wish somebody would explain to me what a head
16 end is.

17 MR. GARRETT: Right now?

18 ARBITRATOR WERTHEIM: No.

19 CHAIRPERSON JIGANTI: What a what is?

20 ARBITRATOR WERTHEIM: A head end. It has
21 something to do with where the cable system receives
22 its signal.

23 MR. GARRETT: That is exactly it.

24 ARBITRATOR FARMAKIDES: We haven't been
25 reluctant to ask questions as we're going along.

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1 MR. GARRETT: We've noticed. Mr.
2 Gerbrandt noticed.

3 CHAIRPERSON JIGANTI: Have a nice evening,
4 everyone.

5 (Whereupon, at 5:10 p.m. the proceedings
6 were adjourned, to reconvene the following day.)
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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Hearing: Distribution of 1990, 1991
 and 1992 Cable Royalty Funds

Before: Library of Congress
Copyright Arbitration Royalty Panel

Date: December 12, 1995

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

Charles Foyett

RATIO -- PROGRAMMING SPENDING TO VIEWING

Cable Network	1990 Ratio	1991 Ratio	1992 Ratio
A&E	1.0	1.0	0.8
BET	0.7	0.9	0.7
CNBC	4.3	2.5	1.3
CNN+HN	0.9	0.6	0.9
DISC	0.7	0.8	0.9
ESPN	2.2	2.7	2.5
FAM	0.5	0.6	0.6
LIFE	1.1	1.0	1.1
MTV	0.8	0.8	0.8
NICK	0.3	0.3	0.3
TNN	0.9	0.7	0.7
TNT	1.6	1.5	1.3
TWC	0.6	0.7	0.6
USA	0.7	0.9	0.9
VH1	1.2	0.7	0.6
AVERAGE:	1.2	1.0	0.9

Source: JSC Exhibit 4, p. 24

[Handwritten signature]
12/24/95
P.S. Ex. 27 -X

BIGGEST BANG FOR THE BUCK: PROGRAM COST EFFICIENCY

The typical basic cable network spends \$20,000-\$25,000/rating point/hour on programming, according to an exclusive PKA analysis (see table below).

The top-ranking nets below demonstrate that program cost efficiency can come on a small (VH-1, TWC), medium (FAM, A&E) or large scale (TBS, CNN).

General-entertainment service TBS heads the list, with an average program outlay of less than \$10,000/rating point/hour. Directly behind is VH-1--a network TBS outspends by more than 6x in generating nearly 7x higher ratings.

The analysis factors in the estimated number of non-repeat program hours, a key determinant in cost efficiency.

For example, TNN spends only slightly more per rating point (\$107 mil.) than VH-1 and TWC (\$95 mil.). But its cost/point/hour is twice as high because TNN telecasts 18 hr./day and repeats a portion of its schedule daily.

In general, music-video services and fixed-cost operations (TWC, E!) scored above average on the efficiency scale, while networks with a heavier mix of licensed product--especially sports--ranked lower.

COST EFFICIENCY ANALYSIS: PROGRAM SPENDING/RATING POINT/HOUR

Network	1992 Program Budget (mil.)	Average 1992 Rating*	Program Expenses/ Rating Point (mil.)	Non- repeat Hours/ Year	Prog. Exp./ Rating Pt./ Non-repeat Hour
TBS SuperStation	\$118.0	1.35	\$ 87.4	8,760	\$ 9,978
VH-1	19.0	0.20	95.0	8,760	10,845
The Weather Channel	19.0	0.20	95.0	8,030	11,831
CNN + Headline News	176.0	0.90	195.6	15,000	13,037
Family Channel	60.0	0.65	92.3	6,132	15,053
Arts & Entertainment	57.2	0.50(e)	114.4	7,300	15,671
Nickelodeon/Nick at Nite	77.0	0.90	85.6	4,745	18,031
E! Entertainment TV	15.0	0.20(e)	75.0	4,015	18,680
MTV	72.0	0.50	144.0	7,300	19,726
USA Network	200.0	1.25	160.0	7,921	20,199
Black Entertainment TV	21.5	0.30(e)	71.7	3,322	21,573
Lifetime	87.0	0.65	133.8	5,540	24,160
Discovery Channel	75.0	0.60	125.0	5,074	24,635
TNN	59.2	0.55	107.6	4,344	24,778
Comedy Central	40.0	0.30	133.3	4,928	27,056
Turner Network TV	275.0	1.00	275.0	8,760	31,393
CNBC	26.0	0.10	260.0	6,570	39,574
ESPN	395.0	0.80	493.8	5,001	98,730
Average			\$152.5		\$24,720

* Average of first- and second-quarter total-day average Nielsen ratings. (e) PKA estimate. © 1992 Paul Kagan Associates, Inc. estimates.

A fractional ratings increase within the existing program budget can dramatically bolster efficiency: A one-tenth of a ratings point gain for MTV to 0.6, for instance, would slash its program cost/point/hour by 17% to \$16,438 (assuming no change in non-repeat hours).

The other side of program cost efficiency is revenue maximization: getting the biggest bucks for the bang, so to speak. Two low-ranking networks on our efficiency index--ESPN and TNT--draw the highest affiliate license fees per subscriber and among the highest ad revenue per rating point.

10TH STORY of Level 1 printed in FULL format.

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July 11, 1994, Monday, Final Edition

SECTION: STYLE; PAGE B2; JONATHAN YARDLEY

LENGTH: 1059 words

HEADLINE: A Slow Game of 'Baseball'?

P.S. Ex. 29 -X

SERIES: Occasional

BYLINE: Jonathan Yardley

BODY:

Thanks in substantial measure to the machinations of Tony LaRussa, manager of the Oakland Athletics and widely regarded as a genius among what passes for baseball's intelligentsia, the Athletics and the Baltimore Orioles frittered away an astonishing 3 hours 43 minutes last Thursday night in the course of playing a mere nine-inning baseball game. If you think that's conclusive evidence that Western Civilization is boring itself into extinction, think about something even more persuasive. Think about Ken Burns. Think about "Baseball."

"Baseball" is Burns's nine-part, 18-hour public television documentary about the National Pastime. The program has been in the works for half a decade, enough to make it "long-awaited," as we masters of journalistic prose like to say. But if you are one of the millions who long await, you got a clue last week that "Baseball" may be far more protracted than the most interminable Baltimore-Oakland snoozer, and vastly more insufferable.

This clue came in the form of "The Making of Baseball," a 30-minute preview of the documentary. Presumably it was offered by public television as a tantalizing peek at riches soon to come, but from where I sat it was about as enticing as a striptease by the circus fat lady. It was, in fact, not so much a preview as an act of institutional self-abnegation wherein PBS flung itself in adoration at the feet of Burns, who on the evidence supplied in these 30 minutes scarcely needs additional ego reinforcement.

Obviously PBS is counting on Burns to do for it in September 1994 what he did a few years ago with "The Civil War," i.e., to get universally adoring reviews and attract hordes of the chattering classes to PBS programming. Perhaps that will happen; strange things happen every day. But what seems more likely is that even the most malleable will find 18 hours of Burns's "Baseball" about, oh, 12 hours more than they really want, and that boredom will lead to disenchantment.

This is because "The Making of Baseball" suggested nothing so much as that Burns has allowed self-infatuation to cloud his judgment and that no one working for or with him has the courage to question his decisions, even the most egregious. Thus we have, for example, this matter of length. "I haven't even begun to worry about it getting too long," Burns said during last week's hagiography, a comment that went without challenge even though "Baseball" at 18 hours will make "Roots" seem like a sitcom. The explanation is simple: Burns works in "an open atmosphere," the reverent narrator told us, "though every final decision is Ken's."

The Washington Post, July 11, 1994

Open, schmopen. Consider "the connection between the Negro Leagues, segregation in the United States and the rise of fascism in Europe," all of this being "part of the story of baseball." In the immortal words of Dave Barry, I am not making this up. The "connection" exists in the mind of Ken Burns, and when he put it to his assembled staff, no one raised more than a timid objection. How indeed could anyone, when none other than Burns declared that "it is absolutely true." He saw an exhibition at the Holocaust Museum that established this "connection," Burns told his awestruck colleagues, and he spent a whole month doing research to assure himself of its validity. Then he railroaded it into "Baseball" and will eventually, in all likelihood, into the minds of the series's watchers.

Well, let's raise one hand in objection. The notion that the segregation in the United States that forced black ballplayers to set up their own professional league somehow aided and abetted the rise of fascism in Europe that in time led to the Holocaust ... wow. It's approximately as loony as the notion, popular among certain brain-dead Americans, that the Holocaust didn't happen at all. If anything, it can be said to be the left-wing mirror image of that right-wing fantasy -- a reduction of complex and painful human experience to conspiracy theories and hallucinations. Burns wants, he said, to "bind these parallel lines together," but that's not binding, it's warping.

This exercise in oversimplification in the service of self-righteousness is presented to us by one who makes a great display of presenting himself as a "historian." In the sense that Burns deals in the raw material of history this is true, but his real business is the manipulation of images and emotions, which is to say the business of television. Make no mistake about it, he is good at this business. "The Civil War" was in many, if not all respects, a fine piece of work, and doubtless there will be some of the same in "Baseball." But like other masters of the television medium, Burns in the final analysis is more interested in entertaining and moving us than in instructing and enlightening us.

Thus we had Burns exclaiming at one point in last week's broadcast, "I just love that image!" and later telling his pet pianist, "That was perfect in my book," after a threnodic rendering of "Take Me Out to the Ball Game." Thus, too, we had a member of his staff talking about "laying sound effects onto silents," which is to say tarting up old film and photographs with manufactured sound. This isn't history but historical fiction, an entirely legitimate genre -- viz., the "Histories" of Shakespeare -- but one not to be confused with history itself.

The danger is that those who practice this genre and those who consume it will permit themselves to be thus confused; it's especially dangerous at a time when television has turned image and reality into a hopeless muddle. But if this causes Ken Burns any self-doubt or qualms, there was no sign of it in "The Making of Baseball." What we were given instead was a man serenely confident in the absolute rectitude of his vision and fawningly reinforced in this illusion by the T-shirted staff -- looking for all the world like the inner circle at Ben & Jerry's -- assembled at his quaint New Hampshire fastness.

Thanks a lot but no thanks. No doubt there will be a great deal of fine old film in "Baseball," but the price of seeing it looks to be too high: emotive music, ponderous narration and ideological indoctrination. It all begins the night of Sept. 18, which happens to be when the Yankees play the Orioles at Camden Yards. When it comes to life's little choices, this is the easiest

The Washington Post, July 11, 1994

imaginable.

LANGUAGE: ENGLISH

LOAD-DATE: July 11, 1994

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September 22, 1994, Thursday, Final Edition

Handwritten signature and date: 12/17/95

SECTION: SPORTS; PAGE B1; TONY KORNHEISER

LENGTH: 1044 words

P.S. Ex. 30 -X

HEADLINE: National Pastime, Past My Bedtime

SERIES: Occasional

BYLINE: TONY KORNHEISER

BODY:

Wake me when they get to Willie Mays.

After watching five full hours of "Baseball" -- and they still hadn't gotten past 1910! -- I began to wonder if I would even live through the ending. Can you believe it, "Baseball" the documentary is as slow as the game it documents.

I'm told it picks up after the first eight hours. But so did the Hundred Years' War, and I wouldn't have stuck around to see that either.

What can you say about "Baseball?" That it is lush, it is loving, and, hoo boy, is it long.

How long is it, Tony?

Do the words "consecutive life sentences" mean anything to you?

Far be it from me to suggest that Ken Burns has woven a corporate funding version of the Emperor's New Clothes -- but playing the National Anthem before each episode? Pardon me, each "inning."

Pretentious?

Pretentious? Moi?

Oh, and Ken: Get a grown-up haircut.

It's not that I don't like baseball. I do. It's just that I guess I didn't go to the right private schools to fully appreciate it. Knowing how crucial "Baseball" is to the care and feeding of the nation's leading poets and intellectuals, I didn't want to sell it short -- just because it seemed to me that it was basically an overblown chunk of baloney. So I telephoned savvy media critic Man About Town Chip Muldoon, and asked if he had seen any of "Baseball."

"I watched the first 10 minutes," he said.

"Oh, that's the part that concentrates on the spring of 1837," I said.

"Yes, I figured I had a long wait until Chico Escuela."

The Washington Post, September 22, 1994

Let's get real. This thing is 18 1/2 hours of slurping at the trough of baseball. If it was any more reverential, Saint Peter would be doing the narration, not John Chancellor. It opens in Brooklyn, with church bells ringing. (Baseball being the church of America, get it?) I'll bet it's set in Brooklyn, because everyone of a certain generation -- the corporate funding generation -- bemoans how Brooklyn doesn't have a baseball team anymore. Then again, you could have started this in Pakistan, because there's no baseball team there, either.

The first words you hear are, "In our sundown perambulations of late ..."

And immediately you get that queasy feeling: Oh, gosh, am I gonna see George Will soon?

Right you are. You get Will, the officious George Plimpton, Shelby Foote -- who's become to Ken Burns what Tony Roberts is to Woody Allen -- and a parade of middle-aged white males telling you, as Bob Costas does, "What you've got to understand is: Baseball is a beautiful thing," or as the poet Donald Hall does, "There's a stillness in baseball that I love." You hear the words "pastoral," "timeless" and "renewal," and you get the feeling of the elegiac symmetry of the emerald chessboard, and it makes you wanna throw up both your hands and holler, "Hark and hot damn, I hear the rhythms of America!"

Of course just once I'd like to see Burns let someone, anyone, say, "I hate to say this, but sometimes baseball can be, uh, boring."

Like when it lasts 18 1/2 hours.

(Let's see, "The Civil War" lasted 12 hours, and this goes 18 1/2. I can't wait for Burns's next big score: 25 hours on "Household Pets," beginning with the touching episode of Shelby Foote consoling a 9-year-old whose turtle fell down the disposal.)

You give me "The Natural," "Field of Dreams" -- without any of the Amy Madigan scenes -- and "Bull Durham," and you can take your 18 1/2 hours and stick them in a museum.

Look, I like baseball. Like all the other old white men in the show, it's the game of my youth and the game of my father. But no matter how many quotes from Walt Whitman you dredge up -- because, hey, who'd Walt Whitman play for? -- I won't think it's poetry and I won't think it's religion, and I won't think it explains the history of America. Not any more than the cotton gin, or the sunset off Monterey Bay, or a Corvette on an open highway.

Oh, Kenny, one more thing: Somewhere during the 18 1/2 hours you're going to show me someone scratching and spitting, aren't you -- even if it's Shelby Foote. Because I've been to a lot of baseball games, and I never had a sense that players sat on the bench and mused about how baseball holds up a mirror to America's soul. And, seriously, if I have to hear the haunting strains of "Danny Boy" or "Take Me Out to the Ballgame" in the background one more night, I think I may hurl. (What happened to "Thank God I'm a Country Boy?" Doesn't Ken Burns watch the O's?)

Enough with the sound of the crack of the bat.

The Washington Post, September 22, 1994

Enough with the phony crowd noise.

Enough with the 1870s!

I sit there and watch this, and it's sort of like being in Colonial Williamsburg, forced to watch endless streams of blacksmiths make endless streams of horseshoes -- because how far can picturesque get you in the 1990s? I learn things I will not ever use unless I am on "Roto Geek Jeopardy!" such as Candy Cummings invented the curve, and a cricketer named Harry Chadwick invented the box score, thus becoming the first Seamhead. Sometimes when I'm watching I feel like going out for a sandwich ... like, to Argentina. Because I know that when I get home, it'll still only be the sixth inning. Kenny, sweetheart, does the word "Cut!" mean anything to you?

Three full days and we weren't even into moving pictures!

I like King Kelly as much as the next guy, but the man has been dead 100 years. How many different photos of the man do we need to see? Ken Burns spent more time on King Kelly than William Manchester did on Robert Kennedy. (I have, however, enjoyed finding out that Evers, of Tinkers to Evers to Chance, was a complete psycho.)

Memo: Somebody tell Okrent to change that sweater already.

I am happy to report that "Baseball" continues through tonight and into the next century on PBS, which, for true baseball fans, is a virgin channel on the dial. ("Hey, MacNeil and Lehrer! Weren't they set-up men for the Brewers when Treblehorn was managing?") If, by some twist of fate, you miss any of it, be assured you can buy the entire boxed set of tapes for a mere \$ 179.95. What a steal! And I'll bet they throw in a lyric sheet for "Take Me Out to the Ballgame." Of course you could simply buy three blank six-hour tapes and do it yourself for nine bucks ... and with the \$ 170 left over, buy two football tickets.

GRAPHIC: PHOTO, KEN BURNS'S "BASEBALL," MIGHT REQUIRE ONE LONG SEVENTH-INNING STRETCH BEFORE IT REACHES A CONCLUSION.

LANGUAGE: ENGLISH

LOAD-DATE: September 22, 1994

P.S. Ex. 31 -X

IMING

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No. 157
May 31, 1991

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To an industry facing continued pressure to hold down rate increases on one hand and tantalized by the programming freedom of the 150-channel system future on the other, the question "What's a channel worth?" has rarely been more crucial.

Our channel valuation models in the past have attempted to provide a quantitative reference point for carriage decisions. This time we have gone a step further and used a combination of survey data, Nielsen ratings and modeling techniques to rank the top networks by their bottom-line contribution.

Using our methodology (see P. 2), the 17 most widely carried basic networks delivered \$7.71/sub/mo. in "value" in 1990, ranging from \$.04 for CNBC to \$1.15 for top-rated TBS. The average was \$.45/channel/sub/mo.

We took three primary criteria into account in developing the valuation rankings: total day ratings, license fees and contribution to local ad sales.

Ratings weighed the heaviest in the formula, as well they should because it is the viewers--who continually vote with their remote controls--that ultimately pay the license fees and determine how much local ad revenue is generated.

We also gave these channels a "step-thru" factor, because it is these high profile channels that are used to sell expanded basic and to account for a portion of the pay revenue that "sticks" to them because subs must buy basic to get pay.

That TBS should win the top ranking is not surprising, since it consistently delivers the highest ratings on basic for one of the lowest license fees (which is actually paid, not to TBS, but to its common carrier). Its ranking would have been higher if operators were allowed to sell local avails on TBS.

The need for the recent CNBC/FNN merger is borne out in the analysis. By splitting the viewership for financial and consumer news between them, their value to the operator suffered. The newly merged entity should rank higher when our 1991 rankings are issued.

There was a remarkable consistency of valuation amongst the group of networks in the middle range. Some networks, such as ESPN, combine solid ratings with high ad sales appeal to offset a high license fee. Others such as Lifetime, balance a mid-range ratings performance with a low license fee.

For the new wanna-be networks, these are the benchmarks to match.

1990 VALUE PER CHANNEL

1 TBS	\$1.15
2 USA	0.90
3 CNN	0.86
4 NICK	0.75
5 ESPN	0.70
6 FAM	0.48
7 TNT	0.51
8 LIFE	0.44
9 MTV	0.38
10 DISC	0.36
11 TNN	0.35
12 A&E	0.23
13 BET	0.20
14 VH1	0.17
15 TWC	0.13
16 FNN	0.08*
17 CNBC	0.04*

Total \$7.71

* Merged May '91
© 1991 PKA estimates.

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CHANNEL VALUATION RANKING

1	2	3	4	5	6	7	8	9	10	11	12	13	14
Rank	Network	1990 24-hr. X Rating	Basic Cable HUT	Basic Service Share	Pay Step-Thru X Factor	Avg. Basic Rate	Basic Service Contrib.	Local Ad Share	Ad X Billings = Per Sub	Local Ad Contrib.	Total Contrib. (Col. 8+11)	Avg. License Fee	Cable Channel Value
1	TBS	1.55	31.7%	4.89	1.54	\$16.58	\$1.25	0.0	\$1.19	0.00	\$1.25	\$0.10 *	\$1.15
2	USA	1.18	31.7	3.72	1.54	16.58	0.95	11.6%	1.19	\$0.14	1.09	0.19	0.90
3	CNN//	0.98	31.7	3.09	1.54	16.58	0.79	28.0	1.19	0.33	1.12	0.26	0.86
4	NICK	1.08	31.7	3.41	1.54	16.58	0.87	0.6	1.19	0.01	0.88	0.13	0.75
5	ESPN	0.88	31.7	2.78	1.54	16.58	0.71	30.3	1.19	0.36	1.07	0.37	0.70
6	FAM	0.65	31.7	2.05	1.54	16.58	0.52	0.7	1.19	0.01	0.53	0.05	0.48
7	TNT	0.93	31.7	2.93	1.54	16.58	0.75	10.4	1.19	0.12	0.87	0.36	0.51
8	LIFE	0.58	31.7	1.83	1.54	16.58	0.47	4.9	1.19	0.06	0.52	0.08	0.44
9	MTV	0.55	31.7	1.74	1.54	16.58	0.44	3.8	1.19	0.05	0.49	0.11	0.38
10	DISC	0.50	31.7	1.58	1.54	16.58	0.40	1.1	1.19	0.01	0.42	0.06	0.36
11	TNN	0.50	31.7	1.58	1.54	16.58	0.40	2.9	1.19	0.03	0.44	0.09	0.35
12	A&E	0.40	31.7	1.26	1.54	16.58	0.32	1.0	1.19	0.01	0.33	0.10	0.23
13	BET	0.30	31.7	0.95	1.54	16.58	0.24	0.0	1.19	0.00	0.24	0.04	0.20
14	VH1	0.20	31.7	0.63	1.54	16.58	0.16	0.4	1.19	0.00	0.17	0.00	0.17
15	TWC	0.20	31.7	0.63	1.54	16.58	0.16	0.4	1.19	0.00	0.17	0.04	0.13
16	FNN	0.13	31.7	0.41	1.54	16.58	0.10	0.1	1.19	0.00	0.11	0.03	0.08
17	CNBC	0.10	31.7	0.32	1.54	16.58	0.08	0.1	1.19	0.00	0.08	0.04	0.04
Tot./Avg.		10.71	31.7%	33.79	1.54%	\$16.58	\$8.61	96.3%	\$1.19	\$1.15	\$9.76	\$2.05	\$7.71

Notes:

- * Rate card fee per sub per month paid to TBS' common carrier. # Ratings and license fees are for CNN and Headline News combined.
- Col. 3 - PKA analysis of A.C. Nielsen data (in some cases ratings are for 18-hour days).
- Col. 4 - PKA analysis of A.C. Nielsen data.
- Col. 5 - Network viewing share calculated by multiplying Column 3 by Column 4.
- Col. 6 - Factor which assigns value to basic for supporting the expanded basic and pay tiers (calculated by dividing total subscription revenue for 1990 of \$16.144 bil. by \$10.498 bil. in 1990 basic revenue).
- Col. 7 - Assumes average monthly basic rate of \$16.58/sub/mo.
- Col. 8 - Network's contribution to basic calculated by multiplying Col. 5 by Col. 6 by Col. 7.
- Col. 9 - Based on survey of 25 systems selling local ads (CABLE TV ADVERTISING #189, 2/22/91).
- Col. 10 - Based on average local ad revenue per ad sub of \$14.29 in 1990.
- Col. 11 - Network share of local ad revenue calculated by multiplying Col. 9 by Col. 10.
- Col. 12 - Total contribution calculated by adding Col. 8 and Col. 11.
- Col. 13 - Avg. license fee/sub/mo.; top of rate card may be higher (CABLE TV PROGRAMMING #155, 3/25/91).
- Col. 14 - Value per channel calculated by subtracting Col. 13 from Col. 12.